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CALUMET, MICH.

THE LAW OF WILLS IN MICHIGAN WITH FORMS

BY

FRANKLIN A. BEECHER,

AUTHOR OF ANNOTATIONS TO THE MICHIGAN CONSTITUTION OF 1908, THE
LAW OF CONTRACTS IN MICHIGAN WITH FORMS, ETC.

WITH INTRODUCTION BY

HON. HENRY S. HULBERT,

ONE OF THE JUDGES OF THE WAYNE COUNTY PROBATE COURT.

DETROIT
FRED. S. DRAKE
1911

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PREFACE.

The subject of Wills is an interesting and important one when viewed from the standpoint of one jurisdiction, especially where the decision of the Court have been of uniform high order and where these have settled most of the points involved in the subject. Precedents, with some exceptions, have not the value in will cases that they have in other branches of the law, and therefore a presentation of the decisions of this particular jurisdiction in a systematic and logical order, amplifying, supporting and illustrating the general principles, will suffice to point out the way for the solution of new problems. Every point has been made to present, as near as possible, the principles in the exact language of the Court.

In Part Two, containing Forms of Wills, a novel feature has been introduced, under the name of a COMPOSITE WILL, which is made up from a variety of usual and exceptional clauses found in wills, out of which any complete will may be formulated. It also includes a number of SELECTED WILLS OF LARGE ESTATES, which may be looked upon as models for the reason that there seems to have been no necessity for the Court's constructions. It also contains CONSTRUED WILLS and DEFECTIVE WILLS which are illustrative of those points to be avoided.

All the references are to the official reports up to volume 162 and thereafter to advance sheet publications, and to all other reports in which the same case appears.

The profession is to be congratulated for the able and learned Introduction, written for this work by Hon. Henry S. Hulbert, one of the judges of the Wayne County Probate Court.

FRANKLIN A. BEECHER.

Detroit, April 6, 1911.

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INTRODUCTION.

The doctrine of wills and probate practice had their source in the Roman law, and both reached a high standard of perfection under this system. Under the common law practically little was known about wills, but in time many of the rules of the Roman law were adopted in English jurisprudence, for the Germanic tribes, who invaded Britain, were largely influenced by Roman law, and, when the conditions and times arose, their descendants were not averse to incorporating these rules in their jurisprudence. To avoid confusion, these rules are only a part of the common law through adoption and not through custom, for our civil polity is of Saxon inheritance and not Roman.

Upon investigation very little can be found among the records of the ancient Saxons relating to wills and the disposition of property by a deceased person. However, it is said by high authority¹:

“We can not think that an instrument, bearing a truly testamentary character, had obtained a well recognized place in the Anglo-Saxon folk-law. With hardly an exception these wills are the wills of very great people, kings, queens, kings’ sons, bishops, earldormen, king’s thegus, etc. In the second place, it is plain that in many cases the king’s consent must be obtained if the will is to be valid,

1. Pollock and Maitland’s pp. 318 and 319.
History of English Law, Vol. 2.

if the will is to 'stand.' That consent is purchased by a handsome heriot. Often enough the will takes the form of a supplicatory letter addressed to the king. In the third place, an appeal is made to ecclesiastical sanction; a bishop sets his cross to the will; the torments of hell are denounced against those who infringe it." Furthermore, the Magna Charta makes reference to a Saxon custom by which the personal property of a man is to be divided into three equal parts, one of which is to pass to his wife, the second to his children, and the third is left for disposition by will.

The doctrine of "Reasonable Parts" was superceded by the testator having the right to will all his goods, but the feudal lord who came in with the Norman Conquest took the best of the goods and the church took another portion for its share, so that there was little left for the beneficiaries to take. However, the real will of modern times derives its existence from a different source.

It has been said that no person has a moral or natural right to be another person's heir or successor. However near a relative may be, whether child or otherwise, he has no moral right to the property of a deceased person, for no one by virtue of any right, natural or indefeasible, can dictate or control another as to what shall be done with his property after death. The right to dispose of one's property as he wishes is solely a statutory right, created with no reference to private rights or interests, but to sound public policy. It is manifest that no right of descent or disposition can exist unless founded upon statute. The legislature may regulate the whole subject, and it has authority to change and remodel the statutes at will, without thereby interfering or infringing the private rights of any one.

Sound public policy is the standard by which the positive rules of law are gauged for enactment. In illustration of this expediency it will suffice to refer to the Thellusson case, decided in the House of Lords in 1805 which led to the passage of the so-called Thellusson Act², the substance of which is the law in this State; to the statutes relating to children born after making will; to omission of testator to provide for a child in being at time of making the will; to issue of deceased legatees who are relatives of the testator; and to widows' right of election.

In early times a will of chattels could be made by parol, i. e., it was good without writing. It was in 1509, the time of Henry VIII, when reading and writing became more disseminated and practiced, that restrictions were made upon verbal wills. This circumstance and a case of perjury in connection with one will, as well as the opportunities for imposition, brought nuncupative wills under the ban of the Statute of Frauds and Perjuries³, and restrictions were placed upon nuncupative testaments in that they were confined to extreme cases. Similar statutes are in effect here. Wills of land were not permitted until 1541⁴, at which time the statutes provided that wills had to be in writing, one of the provisions of our statutes.

We frequently hear the question raised, and often by good authority, as to the relative value of wills; yet if we analyze the statutes of descent and distribution we cannot but realize in how many cases they fail to make an equitable distribution. Take as an illustration any state where the statute gives a widow only dower in her husband's

2. Statutes 39 and 40, Geo. III, c. 98, 1799. and by I Vict. c. 26, §§9 and 11, 1837.

3. Statute of Frauds and Perjuries of 29 Chas. II, c. 8, 1678 4. Statute of Wills, 32 and 34, Henry VIII

real estate where he leaves children, as was the case in Michigan prior to 1909. If the testator died, leaving a widow and children and his entire estate was vacant real estate or timber land, no matter how great its total value, the widow's interest by statute was of no value to her. Still more frequently exceptional conditions in families make it imperative that a man dispose of his estate by will. Again, we are coming more and more to a realization of a certain debt to the community in which we live and, where fortune has favored us with more than the immediate needs of the family require, gifts to public institutions or to charities are greatly to be commended.

In this connection it will suffice to make a few remarks concerning the drafting of wills. The art of drafting a will is a very intricate and difficult one, for it requires not only a thorough understanding of the positive rules of law but great skill in the art of expression. Accuracy, clearness and precision in the language used in the devises, bequests, trusts and residuary bequests are very essential. They must clearly express the intention of the testator. It is advisable, therefore, after ascertaining the intention of the testator, to formulate a plan of the will which should conform as nearly as possible with the testator's intention. A rough draft can now be made and each devise and bequest carefully tested, to be sure that it does not violate any of the positive rules of law, and that the various bequests are not ambiguous. Care should always be taken to see that possible changes in the family are provided for, so that subsequent births or deaths will not make the provisions of the will unjust to the other beneficiaries or perhaps inoperative⁵. Bequests to the public and to religious

5. See *Carpenter v. Snow*, 117 Mich. 489.

or charitable institutions should be drawn with great care not only as to the exact name of the institution, but with respect to the laws under which they are organized.

It is well wherever possible to avoid using descriptions of land in a will, but when it becomes necessary by reason of a specific devise, especial care should be used that the description is full and accurate. If all the provisions are found to be valid in law, to be free from ambiguities, and to provide with reasonable certainty for all contingencies that may arise from changes referred to, a final draft can be made and the will formally executed.

Here attention should be called to the fact that the proper execution of a will is a serious matter, one which should not be done hastily, but the formalities and requirements of the law should be clearly explained to the testator and subscribing witnesses so that they may have a clear understanding of what they are doing and why they are doing it in that particular way. The memory of a human being is at best an uncertain quantity, and often many years elapse between the execution of a will and its proving in court; a witness may be able to identify his own signature, but cannot recall any of the other circumstances.

In the execution of an important will I would suggest the value of having each subscribing witness write out in full and sign his own attestation clause, simply as a means of impressing the details of the execution in his mind.

After the will has been formally and properly executed, under the statutory provision⁶ the testator or some other

6. C. L. 97 (9271), Sec. 10. Any will in writing, being enclosed in a sealed wrapper, and having indorsed thereon the name of the testator and his

place of residence, and the day when, and the person by whom it is delivered, may be deposited by the person making the same, or by any person for

person may deposit the will with the judge of probate, or he may leave it in the custody of some other person. Statutes⁷ also provide how such will shall be kept and disposed of, and that the judge shall give notice of his possession of the will. There is also a statute⁸ relating to the duty of persons having custody of wills upon the death of the testator. In depositing a will for safe keeping either with the judge of probate or other person, care should be taken to make the endorsement upon the outside of the sealed envelope sufficiently full to positively identify the testator, as confusion from a similarity of names is very apt to occur if this is not done. All original data and memoranda used in drawing a will together with a duplicate of the final draft should be kept in the office of the drawer, this because of the frequency with which wills are lost, or intentionally or unintentionally destroyed by persons other than the testator, and the statute provides that a lost will may be

him, with the judge of probate in the county where the testator lives, and the judge of probate shall receive and safely keep such will, and give a certificate of the deposit thereof.

7. C. L. 97 (9272), Sec. 11. Such will shall, during the lifetime of the testator, be delivered only to himself, or to some person authorized by him by an order in writing, duly proved by the death of a subscribing witness; and after the death of the testator, and at the first probate court after notice thereof, it shall be publicly opened by the judge of probate, and be retained by him. (9273) Sec. 12. The judge of probate shall give notice of such will being in his possession, to the executor

therein appointed, if there be one, otherwise to the persons interested in the provisions of the will; or, if the jurisdiction of the case belongs to any other court, such will shall be delivered to the executor, or to some other trusty person interested in the provisions of the same, to be presented for probate in such other court.

8. C. L. '97 (9274) Sec. 13. Every person other than the judge of probate, having the custody of any will, shall, within thirty days after he has knowledge of the death of the testator, deliver the same into the probate court, which has jurisdiction of the case, or to the person named in the will as executor.

probated where its execution and contents can be proved.

In conclusion, the subject of wills not only appeals to laymen, jurists, moralists and statesmen on account of its laying bare human nature, but it fascinates the legal mind, for the rules of law appertaining to the subject have been stripped of many of their technicalities, yet in their application to concrete cases they are open to reasoning of the highest order. The subject is full of human nature, human nature in all its phases. Oftentimes the wills of persons of wealth whose reputations during their lifetime have been unquestioned, show, when under the fire of a contest, most sordid lives, while the wills of persons of whom we least expected it, show virtues that shine forth resplendent in the light of their character. It is thus that wills and the litigation arising out of them reveal human nature in all its nakedness, and all human virtues and vices may be found recorded in the yellow, musty documents of the Probate Court.

HENRY S. HULBERT.

PART ONE—COMMENTARY.

CHAPTER I.

THE NATURE AND SCOPE OF TESTAMENTARY POWER AND OF WILLS.

- §1. The Psychological and Ethical Aspects of Wills.
- §2. The Economic Right.
- §3. The Right to Make a Will.
- §4. Restrictions on the Right to Make Wills.
- §5. Definition of Will.
- §6. Codicil.
- §7. Testament.
- §8. Different Kinds of Wills—Mutual and Joint Wills.
- §9. Difference Between Will and Gift.
- §10. Difference Between Will and Other Dispositions of Property.
- §11. Words of Disposition.
- §12. Words Creating Estates.

§1. The Psychological and Ethical Aspects of Wills.

The primitive psychology of common sense assumes that every man has a will of his own, and upon this assumption the law of wills has been developed. It is the power of choice, of determination, as distinguished from intellect and emotions. The subjective aspect of the will, as interpreted legally, has its source in the *animus testandi* and in the psychological fact as expressed in the maxim, *voluntas testatoris est ambulatoria usque ad mortes* and the will becomes fixed and ready for objective consideration under the maxim which reads, *omne testamentum consummatum morte est*.

Thus, every man can exercise his choice in making a will¹ and the law cannot interfere with his voluntary bequests².

In their ethical aspect there will be found in wills latent expressions of ambition, avarice, charity, hate, hypocrisy, love and pride. The motives that have given rise to the making of bequests may be classified from saintly benevolence to malignant revenge, and it is not infrequent that the criminal instinct has been aroused in persons whose interests have been affected by wills, so that crimes have been committed as the direct result of wills.

§2. The Economic Right.

Some doubt may be expressed from an economic standpoint as to the value of wills, and there are writers who maintain that the law of succession as fixed by the collective will is more satisfactory and equitable in making its distribution than the fluctuating and oftentimes unreasonable and unnatural distributions made by the individual will. In illustration it may be said there are many cases of unreasonable distributions and tying up of estates that deserve the same comment as was made in a celebrated case, by Chancellor Kent, of which he said: "This is the most extraordinary instance upon record of calculating and impelling pride and vanity in a testator, and disregarding the ease and comfort of his immediate descendants, for the miserable satisfaction of enjoying in anticipation the wealth and aggrandizement of a distant posterity. Such an iron-hearted scheme of settlement, by withdrawing property for so long

1. *Pierce v. Pierce*, 38 Mich. 412.

2. *Latham v. Udell*, 38 Mich. 238.

a period from all the uses and purposes of social life, was intolerable.”

§3. The Right to Make a Will.

The right to make a will is not a property right but purely a statutory right,—not subject to the constitutional restrictions for the protection of property. Therefore, it is apparent that the power to make wills, the formalities with which they shall be executed, and their efficiency, depends upon the statute³ and is subject to the legislative control. Thus it is left to the legislature to make such changes, disqualifications and limitations as it may deem proper. Any new requirements as to form of the will, capacity of testator, and so forth, may be altered, changed, or modified at any time before the death of the testator⁴, and there is no constitutional restriction preventing the legislature from making these rules applicable to wills which are already executed. But the legislature cannot by statute interfere with any will where the testator has died before the statute was passed, for it is manifest that upon the death of the testator the property rights become fixed in that the will being found valid the estate or interest becomes a vested property right and in the event that the will is found invalid the vested property right passes to the heirs or next of kin, and not to the testamentary devisee or legatee. The object of the statute of wills⁵ is to give a right by which persons can dispose of their property as they see fit and therefore their objects of bounty may be unrestricted, for it is intended

3. *Beaubian v. Cicotte*, 8 10 Mich. 346.
Mich. 9.

5. C. L. '97, Chapter 248.

4. *Bapt. Miss. Union v. Peek*,

that every person should be at liberty to select the object of his bounty among his relatives at discretion, or even to pass them all by if so disposed⁶, and it may be said that the blood relations are the natural objects of his bounty, but such bounty is not limited by blood relationship, for the reason that such relations have no natural or inherent right to his property⁷. The power to devise land is created and governed by statute⁸ while at common law no such power was known. However, the power to bequeath personal property existed at common law, and any statute⁹, therefore, purporting to authorize the testamentary disposition of personal property is merely declamatory of the right which every person has at the common law to dispose of his property by will¹⁰. In general the right of a testator to dispose of his property by will extends to all his property, and is available against all persons, except in so far as the law has prescribed claims superior to his power¹¹, and courts cannot inquire into the propriety of any disposition which a testator sees fit to make of his property by a legally executed will so long as it is not unlawful¹². Further a testator may empower his trustee to do whatever he could lawfully do himself¹³.

§4. Restrictions on the Right to Make Wills.

All the restrictions placed upon the right of disposition are statutory, and they relate mainly to dower¹⁴ and to the

6. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

7. *Spratt v. Spratt*, 76 Mich. 304, 43 N. W. 627.

8. C. L. '97, §9262.

9. C. L. '71, §2828.

10. *In re High*, 2 Doug. 515.

11. *Miller v. Stepper*, 32 Mich. 194.

12. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

13. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

14. C. L. '97, §8918.

rule of perpetuities¹⁵. The wife has a dower interest in the realty of her husband as well as a distributive share in his personalty¹⁶ from which she cannot be excluded by will, for where a will makes no provision for the widow of a testator her dower right is the same as though he had died intestate¹⁷, but the fact that there is in existence an antenuptial contract securing certain property to the wife does not prevent a testator from making such a will as he pleases¹⁸. Neither can a testator cut off by will his creditors nor the expenses of administration¹⁹, and a mother cannot be deprived of the custody of her child by the appointment of a testamentary guardian²⁰. The conveyance of property by a father to a daughter, the conditions of which have been fully performed, will not be set aside to give effect to a previous will made by the father²¹. The inquiry now leads to what is a will.

§5. Definition of Will.

A will may be defined as the legal declaration of the intentions of a person, which he directs to be performed after his death²² or it is the declaration of a person's mind as to the manner in which he or she would have his or her property or estate disposed of after his or her death²³. From

15. C. L. '97, §§8797, 8798.

16. C. L. '97, §9300. Before the passage of this act the testator could exclude his wife from sharing in his entire personal estate. *Miller v. Stepper*, 32 Mich. 194.

17. *Burrall v. Bender*, 61 Mich. 638.

18. *Rice v. Rice*, 53 Mich. 432, 19 N. W. 132.

19. *Miller v. Stepper*, 32 Mich. 194.

20. *Goss v. Stone*, 63 Mich. 319, 29 N. W. 735.

21. *Goff v. Thompson*, Har. 69.

22. *Byrne v. Hume*, 84 Mich. 185, 47 N. W. 679.

23. *Appeal of Jameson*, 1 Mich. 99.

these definitions it follows that it is the duty of the court to give full and complete effect to the intentions of the testator²⁴.

§6. Codicil.

The word "will" by statute²⁵ shall be construed to include codicils as well as wills. In modern law a codicil may be looked upon as a sort of postscript to the will.

§7. Testament.

It may be said that a will is usually regarded as including a testament, "for when the will operates upon personal property, it is sometimes called a *testament*, and when upon real estate, a devise; but the more general and the more popular denomination of the instrument, embracing equally real and personal estate, is that of *last will and testament*"²⁶.

§8. Different Kinds of Wills—Mutual and Joint Wills.

Wills or testaments are divided into written and unwritten. A nuncupative will is an unwritten one in which a testator declares or makes a solemn declaration of his will *in extremis* in presence of a sufficient number of witnesses, but a declaration by a husband on his death bed to his wife that, if she pays off the mortgage on his farm and supports the family, the land will be hers, cannot, even after full performance by her, be supported as a valid nuncupative will, for the reason that the declaration was a mere conversa-

24. *Byrne v. Hume*, 84 Mich. 185, 47 N. W. 679.

25. C. L. '97, §50, subd. 16.

26. Kent's Comm., Bk. IV.

tion and no disposition was intended²⁷. Through the adoption of the civil law in some jurisdictions the mystic and holographic testament have found their way in our law. A mystic testament is where one encloses his instrument of disposition in an envelope and seals it in presence of witnesses. A holographic or olographic testament is one written wholly by the testator himself.

A mutual will may be defined as the execution of two separate wills by testators, in which they manifest their common intention, while a joint will is one in which the common intention is expressed in one will, signed and executed by both testators.* It may be said that as a general rule mutual and joint wills are valid.** They are subject to the same rules of execution and revocation as other wills. The questions, whether mutual wills form a contract and whether a proponent has by revoking her own will estopped herself from claiming under the other do not come under the jurisdiction of the probate court.†

§9. Difference Between Will and Gift.

The difference between a will and a gift is that a gift must take effect *in præsentī*. It is said that a gift of a chattel capable of delivery, made *per verba de præsentī* by a donor to a donee, and assented to by the donee, whose assent is

27. Campbell v. Campbell, 21 Mich. 438. C. L. '97, §9267. Nothing contained herein shall affect the validity of a nuncupative will, in which the value of the state bequeathed shall not exceed three hundred dollars, provided the same shall be two competent witnesses, nor to prevent any solicitor being in actual mili-

tary service, nor any mariner, being on shipboard, from disposing of his wages and other personal estate by nuncupative will, as he might heretofore have done.

*Edson v. Parsons, 155 N. Y. 555.

***In re Diez's will*, 50 N. Y. 88.

†*Lansing v. Haynes*, 95 Mich. 16, 54 N. W. 699.

communicated to the donor, does not pass the property in the chattel without delivery²⁸.

§10. Difference Between Will and Other Dispositions of Property.

A document in general form of a warranty deed, if properly executed and not delivered as a deed may take effect as a will and be admitted to probate²⁹. It is apparent that an intent manifested in a deed that the title shall remain in the grantor until his death, and then pass to the grantee in case he shall have performed certain conditions, makes the intent testamentary in character and therefore could not be consummated by a deed, but it must be given the effect of a will³⁰, so may a deed be admitted to probate where in form it is to take effect after the death of the grantor³¹. An absolute agreement, given upon a good and valuable consideration, actually delivered, and where upon being delivered, it passed beyond the power and control of the party executing it, is not, although the contract was made payable after the death of the maker, a testamentary disposition of his property so as to bring the document under the statute relative to wills³². Notes executed by the decedent and payable after his death are not in the nature of a bequest³³.

§11. Words of Disposition.

The usual phrase of testamentary disposition is "I give, devise and bequeath." "Give" is a general word and the

28. *Cochrane v. Moore*, 25 Q. B. Div. 57.

29. *Lautenschlager's Estate*, 80 Mich. 285, 45 N. W. 147.

30. *Culy v. Upham*, 135 Mich. 134, 106 Am. St. Rep. 388, 97 N. W. 405; *Leonard v. Leonard*, 145

Mich. 563, 108 N. W. 985.

31. *Lincoln v. Felt*, 132 Mich. 49, 92 N. W. 780.

32. *Reithmaier v. Beckwith*, 35 Mich. 110.

33. *Taylor v. Taylor's Estate*, 138 Mich. 658, 101 N. W. 832.

word gift embraces all voluntary transfers of property without consideration. The words "devise" and "bequeath" are more technical in their meaning. "Devise" is applied to real estate and "bequeath" to personal property. "Give" applies to both.

§12. Words Creating Estates.

"I give, devise and bequeath to A. B., my son or daughter, his or her heirs and assigns forever," or "I give and devise to A. B., my son;" in which case the law supplies the rest. "I give, devise and bequeath to H. C., my son, and after his decease said real estate is to belong to his heirs"³⁴. "I give, devise and bequeath to my beloved son, G. C., my eldest, and after he, my said son, G. C. is deceased, to become the property of said G. C.'s male heirs."³⁵ "I give, devise and bequeath to my daughter, L. D., during her natural lifetime, and after her death to her heirs and assigns"³⁶. "I give, devise and bequeath unto A. B. at the end of ten years after my death ———." "I give, devise and bequeath unto A. B. to be paid him at the end of ten years after my death ———." The former interest is contingent, the latter is vested³⁷.

34. *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505.

35. *Fraser v. Chene*, 2 Mich. 81.

36. *Cousino v. Cousino*, 86 Mich. 323, 48 N. W. 1084.

37. *Hibler v. Hibler*, 104 Mich. 274, 62 N. W. 361.

CHAPTER II.

TESTAMENTARY CAPACITY.

- §13. Animus Testandi, Evidence. Testamentary Capacity in General.
- §14. Sound and Unsound Mind.
- §15. Test of Testamentary Capacity.
- §16. Degree of Memory.
- §17. Insanity.
- §18. Insane Delusion or Monomania.
- §19. The Rule When the Monomania is Conceded.
- §20. Lucid Interval.
- §21. Eccentricity.
- §22. Spiritualism.
- §23. Intoxication and Delirium Tremens.
- §24. Senile Dementia. Idiocy.

§13. Animus Testandi, Evidence. Testamentary Capacity in General.

The *animus testandi* is clearly related to testamentary capacity, for a person may not only lack mental capacity, which may be either temporary or permanent, to form an *animus testandi*, or he may not be in that state of mind when he makes and executes the instrument purporting to be a will. It may be defined as that state of mind, to make disposition; the firm and advised determination to make a testament, closing all inquiry as to the existence and manifestation of one intent. Evidence is admissible to show that an instrument on its face testamentary was not written *animus testandi*, but with this qualification that "in seeking the intention of the maker of an instrument the court must, in the first instance, consult the language of the writing itself. The fact that the writing which is presented for

probate is testamentary in form is *some evidence* that it is a will. The form of the instrument is not controlling. The court of probate may go outside of the writing to ascertain its character, *not to supply an intention which cannot be found in it, but to ascertain with what intention the execution of the instrument was accompanied,*** for when a sane testator, not subject to undue influence, duress, coercion or restraint, mistake, fraud or deceit, intentionally executes with the formalities required by the statute, a writing which in form and substance is testamentary, the writing of itself imports, and conclusively imports, the *animus testandi*. The cases relating to the *animus testandi* or testamentary intent may be divided into three classes:

(1) There are those cases in which the *animus testandi* is clearly deducible from the writing.**

(2) There are those cases in which the *animus testandi* is not clearly manifest because the instrument is ambiguous, or of doubtful meaning.†

(3) There are those cases in which there is nothing to indicate an *animus testandi*.

The general rule is that parol evidence is not admissible to add to, alter, vary, or contradict a will,‡ for evidence is inadmissible to show that declarations were made by the deceased that he did not intend the will to be a final disposition of his estate.††

**In re Kennedy's Estate*, 159 Mich. 548. *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458.

Compare *Lincoln v. Felt*, 132 Mich. 49, 92 N. W. 780; *Underwood on Wills*.

***Bigley v. Souvey*, 45 Mich. 370, 8 N. W. 98.

†*Laulenschlager v. Laulen-*

schlager, 80 Mich. 285 45 N. W. 147.

†*Clay v. Layton*, 134 Mich. 317; *Haines v. Hayden*, 95 Mich., 332, 35 Am. St. Rep. 566, 54 N. W. 911; *Kempsey v. McGinnis*, 21 Mich. 123.

††*In re Kennedy's Estate*, 159 Mich. 548.

The general rule as to testamentary capacity is that any person of sound mind, who has arrived at the age of discretion, and is under no constraint of will, may be said to be capable of making a testamentary disposition of his property in accordance with the prescribed forms of law¹. Three elements in this definition are essential, namely, normality, discretion and freedom in the exercise of one's will. The paramount question is, was the testator qualified or not at the time of making the will? No effect is had upon the validity of a will where a testator was qualified at the time he made the will, but became disqualified after he made the will². The normality of the testator at the time of making the will is the test of its validity from the standpoint of capacity, i.e., according to the common law a person to have testamentary capacity must be of sound disposing mind and memory.

§14. Sound and Unsound Mind.

In law all persons are either of sound or of unsound mind. If the testator was not of sound mind, the law regards him as of unsound mind; and the testator is to be compared with himself, and not with others, in determining whether he was

1. C. L. '97, §9262. Every person of full age and sound mind being seized in his own right of any lands or of any right thereto, or entitled to any interest therein descendible to his heirs, may devise and dispose of the same by his last will and testament in writing, and all such estate not disposed of by the

will, shall descend as the estate of an intestate, being chargeable in both cases with the payments of all his debts. See *Lane v. Lane*, 160 Mich. 492.

2. *Haines v. Hayden*, 95 Mich. 332, 35 St. Rep. 566, 54 N. W. 911; *Kempsey v. McGinnis*, 21 Mich. 146; *Taff v. Hosmer*, 14 Mich. 316.

of sound mind or not³. Sanity is the rule, and insanity the exception⁴.

§15. Test of Testamentary Capacity.

The general rule is well settled that a less degree of mind is requisite to execute a will than a contract.

In general it is apparent that a testator must understand substantially the nature of the act, the extent of his property, his relations to others who might or ought to be objects of his bounty, and the scope and bearing of the provisions of his will, and must have sufficient active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them, and yet he need not have the same perfect and complete understanding and appreciation of any of these matters, in all their bearings, as a person in sound and vigorous health of body and mind would have, nor is he required to know the precise legal effect of every provision contained in the will⁵. It may be said that testamentary capacity does not depend so much upon any particular character of intellect as the ability to remember what property he possesses, what consideration he shall give to those who have claims upon it, and what knowledge he has of the dispositions he wishes to make and of making the disposition⁶. Weakness of mind and forgetfulness are not sufficient to invalidate a will or prevent such person from

3. *Aiken v. Weckerly*, 19 Mich. 482.

4. *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887.

5. *Kempsey v. McGinnis*, 21 Mich. 123.

6. *Schneider v. Vosburgh*, 143 Mich. 476, 106 N. W. 1129.

making testamentary disposition of his property, yet in the latter case he cannot dispose of property the possession of which he but barely appreciates, among parties whose relations to him he knows, but does not understand⁷. Average mental capacity is not required for the making of a will. Power to buy and sell, to deal in property on the basis of contract by giving deeds and leases and making gifts by delivery are qualifications sufficient to render one competent for making a will, for one who has capacity to contract is competent to make a will⁸. Where a will is read over to the testator, as dictated by a third person and the testator objects to it, because it is not drafted as he wants it but finally executes a will in accordance with his wish, this fact does not make him incompetent to transact business⁹. The fact that the testator was weak, or sometimes foolish, or lacked the average mental capacity of his neighbors, or did not dispose of his property as others who knew nothing of his reasons might think he ought to have done, does not incapacitate him from making a will¹⁰. Testamentary capacity is not affected because one is an invalid, nervous, reserved and disinclined or even hardly able to read and write¹¹. Neither does derangement of the mental faculties make one incapacitated from making a will unless it renders him incapable of acting in the ordinary affairs of life or manifests itself in the testamentary provisions¹².

7. *Schneider v. Vosburgh*, 143 Mich. 476, 106 N. W. 1129.

8. *Hoban v. Piquette*, 52 Mich. 346, 17 N. W. 797.

9. *Stuyvesant v. Wilcox*, 92 Mich. 228, 52 N. W. 617.

10. *Rice v. Rice*, 50 Mich. 443, 15 N. W. 548.

11. *Hoban v. Piquette*, 52 Mich. 346, 17 N. W. 797.

12. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

§16. Degree of Memory.

The law does not require a testator to have a perfect memory, but his memory must be sufficiently active so that he can collect in his mind without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive their obvious relation to each other, and to be able to form a rational judgment in regard to them¹³.

§17. Insanity.

All legal incapacity rests upon a deviation from the normal legal standard of mind requisite to make a will. In these deviations are included all the abnormal minds from idiocy to insanity. The latter usually is concerned with the impairment of the normal mind. The deviation must exclude ordinary weakness of memory, vacillating of purpose, credulity, vagueness of thought and such ordinary failings as are inherent in most normal minds. In general it may be said that derangement of the mental faculties ought not to make one incapable of making a will, if the derangement does not affect him so as to incapacitate him from acting rationally in the ordinary affairs of life, or show itself in his testamentary disposition¹⁴. Thus, insanity may be defined, for all legal purposes, as the prolonged departure, without adequate cause, from the states of feeling and modes of thinking usual to the individual in a normal state of health¹⁵. In relation to this subject there are two aspects

13. Aiken v. Weckerly, 19 Mich. 200, 3 N. W. 882, 3 N. W. Mich. 482.

14. Fraser v. Jennison, 42 15. Bouvier's Law Dictionary.

that require the attention of the jurists, i. e. insane delusions and the lucid interval.

§13. Insane Delusion or Monomania.

Insane delusion may be defined as a belief in a fact for which there is no foundation¹⁶ or as a diseased condition of the mind in which persons believe things to exist which exist only, or in the degree they are conceived of only, in their own imaginations, with a persuasion so firm and fixed that neither evidence nor argument can convince them to the contrary¹⁷. It is manifest that no insane delusion exists where a father has the opinion that certain of his children, whom he disinherited, had wronged and cheated him, and were scheming to get possession of his property¹⁸, neither is a belief on the part of a father that the son has no regard for him¹⁹. But a will is void where a testator disinherits a daughter upon the belief that she is a bad woman or that she is not his own offspring, or a son upon the belief that he is a drunkard, or his grandchildren upon the belief that their father has threatened to kill him, and it appears that there is no foundation for such beliefs, but they are mere delusions, although he is competent to manage his business affairs²⁰. If the delusions on the part of the testator do not enter into the provisions of the will or if the provisions are not dictated by the delusions²¹ the will is not vitiated, for a testator who had delusions as to "Greenbacks," or

16. In re Merriman's Appeal, 599, 108 N. W. 369.
108 Mich. 454, 66 N. W. 372.

17. Bouvier's Law Dictionary.

18. Bean v. Bean, 144 Mich.
599, 108 N. W. 369.

19. Bean v. Bean, 144 Mich.

20. Rivard v. Rivard, 109
Mich. 98, 63 Am. St. Rep. 566,
66 N. W. 681.

21. Peninsular Trust Co. v.
Barker, 116 Mich. 338, 74 N. W.
508.

to the effect that he is holding or running for office, or that his wife courted him, or had maltreated him after marriage, or that he is a great man, and likely to be called to the cabinet, are not effective as to testamentary capacity unless they enter into the provisions of the will²².

§19. The Rule When the Monomania is Conceded.

Monomania is insanity upon a single subject. It is an insane delusion which renders the person afflicted incapable of reasoning on that particular subject; he assumes to believe that to be true which has no foundation or reason in fact on which to found his belief.

It may be said that the general rule in regard to cases of this kind is that when the monomania is conceded, it is only necessary to determine whether the provisions of the will are or are not affected by it²³. A man may believe himself to be the Supreme Ruler of the Universe, and nevertheless make a perfectly sensible disposition of his property; and the courts will sustain it, when it appears that his mania did not dictate its provisions²⁴.

§20. Lucid Interval.

A lucid interval may be defined as a period in which an insane person is so far free from his disease that the ordinary legal consequences of insanity do not apply to acts done therein²⁵.

22. *Rice v. Rice*, 50 Mich. 448,
15 N. W. 545, 19 N. W. 132.

23. *Rivard v. Rivard*, 109
Mich. 98, 63 Am. St. Rep. 566,

66 N. W. 681.

24. *Rivard v. Rivard*, 109
Mich. 98, 63 Am. St. Rep. 566,
66 N. W. 681.

25. *Bouvier's Law Dictionary*.

§21. **Eccentricity.**

Eccentricity may be defined as a deviation from the usual way the mass of mankind act and behave when similarly situated. The rule of law is that it has no effect upon testamentary capacity, even where the eccentricity of the person reaches to the verge of insanity²⁶.

§22. **Spiritualism.**

....

Although mere whims, delusions, belief in spiritualism and other peculiar beliefs do not destroy necessarily the testamentary capacity²⁷, yet one who thinks so persistently on the subject as to become a monomaniac by having such confidence in spiritualistic communications through mediums or otherwise that he is impelled to follow them blindly thereby becoming incapacitated to reasoning, is devoid of testamentary capacity²⁸.

§23. **Intoxication and Delirium Tremens.**

The rule as to intoxication is analagous to the rule in cases of delusion and monomania, if the intoxication of the testator renders him incapable of knowing what he is doing and the fact that his intoxication affects the disposition he is making of his property, he is incompetent to make a will²⁹.

§24. **Senile Dementia.**

Senile dementia is one of the most difficult subjects in that part of the law relating to testamentary capacity. It

26. *Prentiss v. Bates*, 88 Mich. 152, 10 L. R. A. (N. S.) 989, 567, 50 N. W. 637. 112 N. W. 736.

27. *Rice v. Rice*, 53 Mich. 432, 19 N. W. 132. 29. *Pierce v. Pierce*, 38 Mich. 412.

28. *O'Dell v. Goff*, 149 Mich.

may be defined as a form of imbecility, which is not due to any specific disease, but rather the result of structural degeneracy incidental or contingent to old age. Old age in itself is no criterion for senile dementia³⁰, for the test rests upon the general question whether the mind and memory of the testator were sufficiently sound so that he knew and understood the transaction in which he was engaged at the time he executed the will.

An idiot is one who hath no understanding from his nativity, and therefore is by law presumed never likely to attain any³¹. It is well established that an idiot cannot make a will, for he does not possess sufficient mental capacity to form an *animus testandi*. Where proof does not amount to idiocy or to such imbecility as disqualifies one from making a will, it does not incapacitate the testator³². The fact that one is an invalid, nervous, reserved and disinclined or even hardly able to read and write does not in any way establish the idiocy or imbecility of the testator or his lack of testamentary capacity³³.

30. O'Connor v. Madison, 98 Mich. 346, 17 N. W. 797.
Mich. 183.

31. Black, Com. I.

32. Hoban v. Piquette, 52

33. Hoban v. Piquette, 52
Mich. 346, 17 N. W. 797.

CHAPTER III.

MISTAKE, FRAUD, UNDUE INFLUENCE.

- §25. In General.
- §26. Mistake.
- §27. Fraud.
- §28. Undue Influence.
- §29. Fraud As to Undue Influence.
- §30. Undue Influence Exercised After Execution of Will.
- §31. When Undue Influence Must Be Exercised.
- §32. When no Fatal Undue Influence Exists
- §33. Unnecessary to Show Freedom of Influence.
- §34. Rule of Law as to Proof of Undue Influence.
- §35. The Different Kinds and Forms of Undue Influence.
- §36. Effect of Undue Influence.
- §37. Lack of Fairness in Will Raises no Presumption of Undue Influence.
- §38. Duress.
- §39. Spiritualism and Undue Influence.
- §40. Undue Influence on Part of Wife.

§25. In General.

In the expression of the *animus testandi* there are certain elements essential to the internal structure of the will, while there are certain external features that may affect the reality of the *animus testandi*, and therefore they enter into the external structure of the will. Mistake, fraud and undue influence are of that nature that they may render the *animus testandi* unreal. Thus, like in contracts, there are affirmative defenses which, in the case of wills may be made to the probate of will, for where on the face of it, the will is valid, there may be facts which show that the *animus testandi* was not free from taint.

§26. Mistake.

Mistake usually accompanies fraud. However, mistake may be divided into mistake of intention and mistake of expression. It is in the former instance that a will may be wholly or partially vitiated, although otherwise formal, by establishing that it was not executed *animus testandi*¹. Mistakes of expression are confined to the construction of wills. It is apparent that a naked mistake must be distinguished from a mistake resulting from misrepresentation².

§27. Fraud.

Fraud may be divided into fraud in the execution and fraud in the inducement. The former arises where a person is ignorant of the nature and contents of a will which he is induced to execute, owing to the false statement made wilfully with full intent to deceive him as to the facts, and thereby actually deceiving him; while the latter may arise where a person has full knowledge of its nature and contents, but the wilful false statements of facts are intended to and do induce him to execute the will which he does. In its nature fraud is closely related to undue influence. Fraud is deceit, while undue influence operates on the will in that it overpowers it. Thus, where the false representations made to a testatrix by a brother, who was a lawyer and the draftsman of her will, that the residuary clause in a former will, whereby a trust estate was created for the benefit of her brothers, would affect the

1. Haines v. Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566

2. Haines v. Hayden, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911.

validity of the will, and that it would be better to eliminate it, the fact that he concealed from her knowledge that the clause might be drawn to satisfy her wish, with full knowledge that she relied upon him, constituted fraud perpetrated in the execution of the will³. A will which is obtained by fraud is absolutely void⁴.

§28. Undue Influence.

Undue influence cannot be presumed, it cannot be established unless the circumstances are inconsistent with any other hypothesis, it is neither advice nor argument nor persuasion nor appeals to the affections, ties of kindred, sentiments of gratitude, nor pity for future distribution⁵, but influence obtained by flattery, importunity, superiority of will, mind or character, or by what art soever that human thought, ingenuity or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy free agency, or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue, when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another⁶. It is clear that in order to invalidate a will the undue influence must amount to force or coercion so great as to render the party upon whom it is exerted unable to refuse⁷ and influence short of this amount would

3. *Lyon v. Dada*, 111 Mich. 340, 69 N. W. 654.

4. *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 556, 54 N. W. 911.

5. *Sullivan v. Foley*, 112 Mich.

1, 70 N. W. 322.

6. *Schofield v. Walker*, 58 Mich. 96, 24 N. W. 624.

7. *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401, *Kemprey v. Maginis*, 2 Mich. N. P. 42.

not constitute undue influence⁸. Facts and circumstances form the basis of influence from which the undue influence is to be established⁹. The validity of a will is affected by undue influence, but not where it is predicated upon opportunity alone, or upon conduct in the line of filial duty, or upon a disposition of property not in accordance with the statute of descent¹⁰. It is not the question of what amount of influence is required to influence a strong and intelligent mind, but what amount is required to be exerted to influence the mind of the person on whom it is exerted¹¹. Declarations on the part of the testator that others hounded him to make the will are not admissible for the purpose of establishing undue influence^{11a}.

§29. Fraud As to Undue Influence.

Undue influence is sometimes a subtle species of fraud, savoring of deceit. Thus when due influence is exercised through fraud, it justifies the refusal to admit a will to probate¹².

§30. Undue Influence Exercised After Execution of Will.

The exercise of undue influence after a valid will has been executed cannot invalidate the will¹³.

8. *Sullivan v. Foley*, 112 Mich. 1, 70 N. W. 322.

9. *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681.

10. *Severance v. Severance*, 90 Mich. 417, 52 N. W. 292.

11. *Sullivan v. Foley*, 112

Mich. 1, 70 N. W. 624.

11a. *In re Kennedy's Estate*, 159 Mich. 548.

12. *Dodson v. Dodson*, 142 Mich. 586, 105 N. W. 1110.

13. *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911.

§31. When Undue Influence Must Be Exercised.

In order to affect the validity of a will the undue influence must be exercised at the very time of making the testamentary dispositions of property, but the pressure may have been brought to bear previously and if it remained so as to coerce the mind of the person making the will at the time the will was executed, it cannot be sustained as the testament or act of that person¹⁴.

§32. When no Fatal Undue Influence Exists.

No fatal undue influence exists unless there is a person incapable of protecting himself, as well as a wrong-doer to be resisted¹⁵.

§33. Unnecessary to Show Freedom of Influence.

Absolute freedom of influence need not be shown in order to establish a will, for the question is, was the will of the testator overpowered¹⁶?

§34. Rule of Law as to Proof of Undue Influence.

On account of the exclusion of all presumptions of undue influence over a person of sound mind, the rule of law is that a person who asserts that the will or instrument ought not to have any force or effect because obtained by undue influence must prove affirmatively that it was so obtained¹⁷.

14. In re Shepardson's Estate, 53 Mich. 106, 18 N. W. 575.

15. Latham v. Udell, 38 Mich. 238.

16. Schneider v. Vosburgh, 143 Mich. 476, 106 N. W. 1120.

17. In re Shepardson's Estate, 53 Mich. 106, 18 N. W. 575.

§35. The Different Kinds and Forms of Undue Influence.

According to the facts and circumstances that constitute undue influence, three kinds of forms may be established.

(1) Those facts and circumstances which enter into an appeal with such a degree of force as to coerce the mind and render the will inoperative¹⁸.

(2) Those facts and circumstances which enter into flattery with such a degree of force as to coerce the mind and render the will inoperative¹⁹.

(3) Those facts and circumstances which enter into cunning with such a degree of force in the form of fraud and deceit as to coerce the mind and render the will inoperative²⁰.

§36. Effect of Undue Influence.

Only such part of a will is void which is the direct result of the exercise of undue influence²¹.

§37. Lack of Fairness in Will Raises no Presumption of Undue Influence.

The law recognizing no presumption of undue influence, it is clear that lack of fairness in a will cannot raise a presumption of undue influence²².

§38. Duress.

Duress in relation to undue influence may be said to be the use of such force or coercion as may interfere and de-

18. Rivard v. Rivard, 109 Mich. 98, 63 Am. Rep. 566, 66 N. W. 681.	Dada, 111 Mich. 340, 69 N. W. 654.
19. Schofield v. Walker, 58 Mich. 96, 24 N. W. 624.	21. Rivard v. Rivard, 109 Mich. 98, 63 Am. Rep. 566, 66 N. W. 681.
20. Haines v. Hayden, 95 Mich. 332, 54 N. W. 911, Lyon v.	22 In re Merriman's Appeal, 108 Mich. 454, 66 N. W. 372.

stroy the free will power of the testator. Thus where the testator is induced, through threats, force and violence, to make his will, the coercion will amount to duress the result of undue influence²³.

§39. Spiritualism and Undue Influence.

A testator who is such a firm believer in spiritualistic communications received through mediums or otherwise that he is impelled to follow them blindly, is affected by the undue influence of his belief to such an extent that his free will power is destroyed²⁴.

§40. Undue Influence on Part of Wife.

It is said that a testator is not unduly influenced by his wife unless she practices fraud or deceit upon him to such an extent as to destroy his power of will or she exercises such mastery over his will as to deprive him of free agency, but there is no rule which discourages the exercise by a wife of any such wifely influence over a husband as does not indicate that he is incapable of protecting himself adequately from her compulsion, and is practically not a free agent²⁵. There is no doubt but what the general condition and surroundings of the deceased, and his relations with his wife—who is the person supposed to have exercised the influence over him—may be properly shown for any period which can reasonably be regarded as bearing

23. *Sullivan v. Foley*, 112 N. W. 736.
Mich. 1, 70 N. W. 322.

24. *O'Dell v. Goff*, 149 Mich. 412; *Pierce v. Pierce*, 38 Mich. 238;
152, 10 L. R. A. (N. S.) 989, 112 Mich.

on the act of disposal of the property. But as the only important inquiry is concerning the pressure of undue influence at the very time of the will, the testimony to show facts of an inferential nature must be confined to what would be legitimately regarded as his then present relations²⁶.

26. *Pierce v. Pierce*, 38 Mich. 412.

CHAPTER IV.

FORMAL REQUISITES OF A WILL.

- §41. External Elements.
- §42. What Law Governs.
- §43. Property Disposition in General.
- §44. Nature and Validity of a Bequest.
- §45. Time of Wills Becoming Effectual.
- §46. Revocability.
- §47. Form in General. Statute.
- §48. Evidence.
- §49. Writing.
- §50. Language.
- §51. Will Written on Several Pieces of Paper.
- §52. Reference to Documents to be Incorporated.
- §53. Erasures and Interlineations.
- §54. Certainty of Description.
- §55. The Law Applicable to Wills.
- §56. Mode and Requisites in Execution.
- §57. The Signing by the Testator.
- §58. Modes of Signing.
- §59. Signature by Name.
- §60. Signature by Mark.
- §61. Time of Affixing Signature.
- §62. Signing by Some Other Person for Testator.
- §63. What Persons May Sign for Testator.
- §64. Presence of Testator.
- §65. Sufficient Direction.
- §66. Form of Signing.
- §67. Manner of Signing.
- §68. Signing by Mark.
- §69. Guiding Testator's Hand.
- §70. Place of Signature on Will.
- §71. Attestation and Subscription.
- §72. Distinction Between Attestation and Subscription.
- §73. Competency of Subscribing Witnesses.
- §74. Time of Competency.
- §75. What Persons Are Competent to be Attesting Witnesses.
- §76. Number of Attesting Witnesses.
- §77. Value of Testimony of Subscribing Witnesses.
- §78. Will Established by Evidence Other Than That of Attesting Witnesses.

- §79. Evidence of Completion.
- §80. Presence.
- §81. Presence in Case of Blindness.
- §82. Witnesses to Sign in Presence of Each Other.
- §83. Attestation Clause.
- §84. Will Defectively Executed.
- §85. Acknowledgment.
- §86. Publication.
- §87. Execution of Mystic or Sealed Testaments.
- §88. Delegating Power to Appoint Executor.

§41. External Elements.

The statutes relating to wills declare what property may be devised and bequeathed by including a provision for a devise of real property¹ and by confirming the previously existing common law right of making disposition of personal property², and further they declare the formalities³ required to make a valid will. These may be classified as follows: Writing, signature by testator, competency of witnesses, attestation and signatures by witnesses. In treating these essential internal elements of wills, they may be divided into three topics.

- (1) Nature of testamentary disposition;
- (2) Form and contents of document;
- (3) Execution.

In order that the form and validity of a will be unques-

1. C. L. '97, §9262. Every person of full age and sound mind being seized in his own right of any lands or of any right thereto, or entitled to any interest therein descendable to his heirs, may devise and dispose of the same by his last will and testament in writing and all such estate not disposed of by will, shall descend as the estate of an intestate, being chargeable in both cases with the payments of all his debts.

2. C. L. '97, §9265. Every person of full age and sound mind, may by last will and testament, in writing, bequeath and dispose of all his personal estate remaining at his decease, and all his rights thereto, and interest therein, and all such estate, not disposed of by the will, shall be administered as intestate estate.

3. C. L. '97, §9266. No will made within this state, except such nuncupative wills as are

tioned the essential internal elements as embodied in the statute must be substantially complied with.

(1) *Nature of Testamentary Disposition.*

§42. What Law Governs.

In determining this question it becomes necessary to inquire what is meant by domicile. Domicile may be defined to be the place where a person has his true, fixed permanent home, and principal establishment and to which, whenever he is absent, he has the intention to return, but "in many cases, actual residence is not indispensable to retain a domicile, after it has been once required; but it is retained *animo solo*, by the mere intention not to change it. If, therefore, a person leaves his home for temporary purposes, but with an intention to return to it, this change of place is not in law a change of domicile. Thus, if a person goes on a voyage to sea, or to a foreign country, for health, or pleasure, or business of a temporary nature, with an intention to return, such transitory residence does not constitute a new domicile, or amount to an abandonment of the old one⁴." The general rule of the common law is in vogue as to the execution of wills where a party is domiciled in Michigan, but makes his will abroad⁵.

mentioned in the following section, shall be effectual to pass any estate, whether real or personal nor to change or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses, and if the witnesses

are competent at the time of attesting the execution of the will, their subsequent incompetency from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it be otherwise satisfactorily proved.

4. Rue High's Appeal, 2 Doug. 515.

5. Rue High's Appeal, 2 Doug. 515. See §55. See also *in re Kennedy's Estate*, 159 Mich. 548.

§43. Property Dispositions in General.

In general it may be said that courts have no right to substitute their judgment for the judgment of the testator in regard to his dispositions, or to determine upon the wisdom or justice of his reasons for making the dispositions, and it makes no difference whether they are wise or unwise, just or unjust, they are for him and for no one else to determine⁶. It is natural that where all children of a testator are deserving that natural justice would call for an equal distribution of the estate of the testator, share and share alike, but courts must not be insensible to the absolute right which a parent has to dispose of his property in such a manner as he sees fit; that he is most capable of determining which of his children are most deserving in his estimation⁷. Courts should not seek out technicalities, to arrive at forced or far-fetched conclusions, in order to destroy a will, because of any idea that the testator has done his next of kin injustice, or conveyed his property away from his relatives, and given it to those who have no claim upon his bounty⁸.

§44. Nature and Validity of a Bequest.

The validity and sufficiency of a bequest where a transfer of personalty in the nature of a bequest has been made, cannot be set aside merely because it shows an unnatural disposition on the part of the deviser and is wrong in morals, so long as there is no evidence that it was brought about by fraud or undue influence and that the

6. Latham v. Udell, 38 Mich. Mich. 53, 42 N. W. 670.

238. 8. Stebbins v. Stebbins, 86

7. Campbell v. Campbell, 75 Mich. 474, 49 N. W. 294.

grantor was of a sufficiently sound mind to dispose of his property⁹.

§45. Time of Wills Becoming Effectual.

A testamentary instrument is fixed whenever the paper propounded as a will has been subjected to every kind and degree of proof on probate which would be necessary according to its provisions, and upon which the court passed judgment¹⁰. The probate of a will for all purposes relates to the existence and transfer of title, and it affirms the title of the beneficiary under the will from the time of the death of the testator, and it relates back to that time so as to make valid whatever had been previously done which under the will after probate the beneficiary could lawfully have done¹¹. It is well settled that a residuary legatee of lands holds title subject to the antecedent legacies, and unless the land is taken by the executors for the purpose of administration, may have and defend possession from the time the will is probated¹². A statute¹³ which provides that no will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court, does not prevent the probate of a will to relate back to the death of the testator¹⁴.

9. *Twist v. Babcock*, 48 Mich. 513, 12 N. W. 680.

10. *Allison v. Smith*, 16 Mich. 429.

11. *Sutphen v. Ellis*, 35 Mich. 446; *Richards v. Pierce*, 44 Mich. 444, 7 N. W. 54; *Gray v. Franks*, 86 Mich. 385, 49 N. W. 130.

12. *Chapman v. Craig*, 37 Mich. 370.

13. C. L. '97, §9281. No will

shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court as provided in this chapter, or on appeal, in the circuit or supreme court, and the probate of a will of real or personal estate, as above mentioned, shall be conclusive as to its due execution.

14. *Richards v. Pierce*, 44 Mich. 444, 7 N. W. 54.

§46. Revocability.

The rule is well established that a will can be revoked any time before the death of the testator¹⁵. A testamentary grant of land in which it is provided that it shall remain the property of the grantor during his life time and go to the grantee on his death, is a mere devise, revocable at will¹⁶.

(2) *Forms and Contents of Document.*

§47. Form in General. Statute.

No instrument will be entitled to probate unless the requirements of the statute have been complied with, although its disposition is testamentary in character. The test as to whether the dispositions are testamentary or not rests in the question, is there an *animus testandi*, and have the formalities of execution, attestation and acknowledgment prescribed by statute been complied with¹⁷. Any form of words can be used to make a will, and all that is necessary to constitute such an instrument is that "it shall clearly appear by the intention of the party to have it operate after his death, and not before¹⁸." Thus, an instrument drawn up, at the request of a person lying at the point of death, as his will, purporting on its face to

15. No will nor any part thereof shall be revoked unless by burning, tearing, canceling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed in this chapter; or by some other writing, signed, attested and subscribed in the manner provided in

this chapter for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. C. L. '97, §9270.

16. Bigley v. Souvey, 45 Mich. 370, 8 N. W. 98.

17. Gibson v. Van Syckle, 47 Mich. 439, 11 N. W. 261.

18. Rue High, 2 Doug. 515.

be his will, his last will, containing a bequest of all his property and a parting farewell to his relatives, and executed in the presence of witnesses, who attested its execution, complies with all the requisite formalities. An unwitnessed instrument is void as affecting the will or the estate of the devisee therein named¹⁹. An instrument executed with the formalities required by law for wills, certifying that upon a certain condition a certain sum is to be paid out of the estate of the deceased as compensation for services rendered is a will, and not a mere acknowledgment of indebtedness, since it was not to take effect until the death of the subscriber, and was subject to be defeated by his marriage²⁰. Again, an instrument in form of a letter executed according to law is a valid will²¹. An instrument in the form of a bond is testamentary, when it does not pass an interest *in præsenti*. It must be revocable and must not take effect till the death of the maker²². As to deeds it may be said that the "line of separation between what constitutes a deed and what constitutes a will is sometimes so faintly drawn that distinction between them becomes extremely doubtful." Where a grantor expressed his intention in a deed that title should remain in him until after he died, and that it should pass upon the performance of certain conditions to the grantee, the deed is testamentary for the intent is testamentary in character and cannot be consummated by a deed²³. A deed usually passes an estate *in præsenti*, although the right to possess

19. *Finegan v. Theissen*, 92 Mich. 173, 52 N. W. 619.

20. *Ferris v. Norville*, 127 Mich. 444, 54 L. R. A. 464, 80 Am. St. Rep. 480, 86 N. W. 960.

21. *Rue High*, 2 Doug. 515.

22. *Matter of Lantenschlager*, 80 Mich. 285, 45 N. W. 147.

23. *Culy v. Upham*, 135 Mich. 131, 106 Am. St. Rep. 388, 97 N. W. 405; *Moody v. Macomber*, 159 Mich. 657.

sion and enjoyment may not accrue until some future time, while a will does not pass any interest until after the death of the testator²⁴. A court of inferior jurisdiction sustained a will in which no beneficiary was named, the will being otherwise properly executed^{24a}.

§48. Evidence.

The rule is established that evidence is admissible to show that a deed or other instrument of gift, which on its face is not testamentary, was not to operate until the death of the maker of the deed or instrument²⁵.

§49. Writing.

All wills must be in writing with the exception of nuncupative wills. Verbal additions cannot affect wills. All additions must be made in writing by way of codicil. It is provided by statute that the words "written" and "in writing" may be construed to include printing, engraving and lithographing; except that in all cases where the written signature of any person is required by law, it shall always be the proper hand-writing of such person; or in case he is unable to write, his proper mark²⁶.

§50. Language.

The language in which a will is written does not affect in any way the will, if it properly complies with the formalities required by law²⁷.

§51. Will Written on Several Pieces of Paper.

In general it may be said that under the Statute provid-

24. *Jenkinson v. Brooks*, 119 Mich. 108, 77 N. W. 640.

24a. This case was kindly furnished us by William H. Wetherbee, Esq. It was tried in the Circuit Court of Macomb Coun-

ty. The court relied upon the case, *In re Harrison*, *Turner v. Hellard*, 30 Law Reports, 390.

26. C. L. '97, §50, Subd. 17.

27. *Walter's Will*, 64 Wis. 487.

ing that wills must be in writing, a will is valid, although written on several pieces of paper. Where a sheet of foolscap was torn in two, and the top half of one sheet was pasted to the bottom half of the other, the will is valid²⁸. In this case the signature of the testator came just below the line of union.

§52. Reference to Documents to be Incorporated.

The fact that a will may consist of several pieces of paper leads to the inference that reference may be made to documents which are to be made a part or incorporated in the will. In general it may be said that three requisites are essential to incorporate a document in a will.

(1) It must be in existence at the time of the execution of the will²⁹.

(2) It must be readily identified by the reference in the will³⁰.

(3) It must be referred to in such a way that the intention of the testator is manifest that he incorporated the document in his will³¹.

Where a will was made by a testator devising all his property and subsequently an unwitnessed paper certifying his wish that certain property included in the will should be applied to the benefit of a certain school, the paper was not properly incorporated in such will, nor was it valid^{31a}.

§53. Erasures and Interlineations.

It is manifest that a will is not rendered invalid, where

28. *Lamb v. Lippincott*, 115 Mich 611, 73 N. W. 887.

29. *Smith v. Smith*, 54 N. J. Eq. 1.

30. *Skinner v. American Bible Society*, 92 Wis. 209.

31. *Hunt, ex rel v. Evans*, 134 Ill. 496, 11 L. R. A. 185.

31a. *Finegan v. Theisen*, 92

a daughter at the request of the testator fills in the correct date upon his discovering its omission, although the daughter is the sole beneficiary mentioned in the will³². The presumption will be that where interlineations of the words "death" and "signed in the presence of" were made before execution of the instrument³³, no effect having been had on the dispositions.

§54. Certainty of Description.

The description of the property must be clear and certain and not inconsistent with subsequent bequests, so that the will is consistent with itself and free from repugnancy³⁴.

(3) *Execution of Written Wills.*

§55. The Law Applicable to Wills.

The early English statute³⁵ which formed the basis of our statute relating to the execution of written wills, provided, in effect, that "all devises and bequests of any lands or tenements devisable * * * shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of no effect." The substance of this statute with some modifications was embodied in the statute²⁶ which provides that, no will made within this state, except such nuncupative wills as are mentioned in the following section, shall be effectual to pass any estate, whether real

Mich. 173, 52 N. W. 619.

32. *Lange v. Wiegand*, 125 Mich. 647, 85 N. W. 106.

33. *Jersey v. Jersey*, 146 Mich. 665, 110 N. W. 660.

34. *Stebbins v. Stebbins*, 86 Mich. 474, 49 N. W. 294.

35. 29 Car. II, §5, June 24, 1077.

36. C. L. '97, §9266.

or personal, nor to change or in any way affect the same, unless it be in writing and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses; and if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it be otherwise satisfactorily proved. The rule of law which is applicable as to wills executed abroad by persons domiciled in this state, is the common law rule, by which it is not essential to the validity of a will that it should be attested by witnesses³⁷. It is well settled at common law that every man has a right to dispose of his property by will and the statute merely confirms this right³⁸. If a will of personal property is regularly made in accordance with the forms and solemnities required by the law of the domicile of the testator, it is sufficient to pass such property in every other country in which the same is situate³⁹. The rule in regard to real property is that the mode of execution and the validity of a will must be governed exclusively by the *lex rei sitæ*, the law where the land is situated⁴⁰. It is said that as to the construction or meaning of the words employed in the will, they are usually governed by the law of the domicile of the testator, even though they relate to real estate in some other state or country⁴¹.

37. Rue High, 2 Doug. 515.

38. Rue High, 2 Doug. 515.

39. Rue High, 2 Doug. 515.

40. Ford v. Ford, 80 Mich. 42,

44 N. W. 1057.

41. Ford v. Ford, 80 Mich. 42,

44 N. W. 1057.

§56. Mode and Requisites in Execution.

The proposition is self-evident that a document not executed in compliance with the statute, although purporting to make distributions of a person's estate after her death, is not a will⁴². It was previous to the passage of the "act concerning churches and religious societies," etc., providing for proof in open court by three witnesses of wills containing bequests relating to churches and religious societies, that a will of this kind was executed with only two attesting witnesses. Although it was not re-executed after the passage of this act, and took effect after such passage by death of the testator, the will was nevertheless valid as well as the bequests⁴³.

§57. The Signing by the Testator.

The statute provides that the will must be "signed by the testator, or by some person in his presence and by his express direction." This clause was taken from 29 Car. II. § 5. The manner of requesting the witnesses to attest and subscribe is not essential, for the testator need not in terms request the witnesses to attest the will. It is immaterial how the request is conveyed to the witnesses, if it appears that such request was the free and intelligent act of the testator^{43a}.

§58. Modes of Signing.

Under the statute there are two ways in which a testator may sign a will.

(1) By affixing his own signature.

42. *Clay v. Dayton*, 134 Mich. 317, 96 N. W. 458.

43. *American Baptist Mission-*

ary Union v. Peck, 10 Mich. 341.

43a. *Kempsey v. Maginnis*, 2 Mich. N. P. 49.

(2) By having some other person whom the testator authorizes to affix his signature in the manner required by statute.

§59. Signature by Name.

The form of signature is not material whether the name is written in full, or abbreviated or whether written with pencil, ink or stamp.

§60. Signature by Mark.

A valid signature may be made by mark, i. e., a cross over which is written the words "his or her mark." This mode would be sufficient in law. The cause for signing by mark is usually illiteracy or ill health.

§61. Time of Affixing Signature.

It is evident that the signature or acknowledgment by the testator must precede, in point of time, subscription by the witnesses⁴⁴.

§62. Signing by Some Other Person for Testator.

The statute provides that, if the will is not signed by the testator personally, then it must be signed by some person in his presence, and by his express direction. It is apparent that if a man, owing to being deprived of hands, or being paralyzed, or being blind, or in any other way being unable to write or make a cross, he is not for any of these reasons deprived from making a will, provided he is otherwise competent. The provisions of the statute ex-

44. Schermerhorn v. Merritt, 123 Mich. 310, 82 N. W. 513. Re-hearing denied. It is good prac-

tice to have the testator sign the margin of each page of the will, for the purpose of identification and the prevention of fraud.

pressly disclose that he can direct some person to sign for him. To make this signature valid, it is essential that the testator expressly request the person to affix his signature in his presence. Thus, there are two requisites necessary to affix the signature of another:

(1) The person directed to sign the name of the testator must sign the name in his presence.

(2) The person must be expressly requested to do so by the testator.

§63. What Persons May Sign for Testator.

The statute being free of restrictions, it follows that any person may sign the will for testator, provided he has been properly authorized by the testator to do so. Thus where the signature of the testator was written by a subscribing witness at the request of the testator, the signature was valid⁴⁵.

§64. Presence of Testator.

The word "presence" in this connection may be interpreted the same as it is when applied to subscribing witnesses. It is clearly inferential that where a person has affixed the signature of the testator at his request, but not in his presence, the signing is invalid under the statute. In the application of the principle relating to subscribing witnesses in this connection, it may be said, that interpreting the phrase "in the presence of" due regard must be had to the circumstances of each particular case. If he signs within testator's hearing, knowledge and understanding, and so near as not to be substantially away from him, he is considered to be in his presence⁴⁶.

45. *In re Langan*, 74 Cal. 353. Mich. 581, 46 N. W. 106.

46. *Cook v. Winchester*, 81

§65. Sufficient Direction.

Where a draftsman said to the testator after he had completed his will, "You can make your cross and I can sign it for you, if you so direct," to which the testator replied, "Very well, do so," this direction was deemed sufficient under the statute⁴⁷.

§66. Form of Signing.

Where a testator has been disabled by paralysis from signing his will, and he directed his solicitor to sign for him, who wrote the following: "This will was sealed and approved by Captain Frederick Blair, by C. C., in the presence of J. M. and J. H. and C. C.," the signing as sufficient and valid⁴⁸. "A. B. by C. D. in his presence and at his request" affixed to a will is a valid signature⁴⁹, so is a signature made by the witness writing his own name and then adding that it is done for the testator at his request⁵⁰. "Signed on behalf of testator, in his presence and by his direction by me, J. C.," constitutes a valid signature⁵¹.

§67. Manner of Signing.

Where a testator towards the end of his life had his usual signature engraved, so that it might be stamped on letters and other documents requiring his signature, he had so stamped by another person, in his presence, and at his direction two codicils which he had made to his

47. *Mullin's Estate*, 110 Cal. 252.

48. *In Re Goods of Blair*, 6 Notes of Cases in Eccl. Courts 528.

49. *Abraham v. Wilkins*, 17 Ark. 292.

50. *Vernon v. Kirk*, 30 Pa. St. 218.

51. *In re Clark*, 2 Curt. 329.

will and this manner of affixing his signature was deemed properly executed⁵².

§68. Signing by Mark.

The best way for signing by mark is to have the testator make his cross and then have some one who can write indicate by writing over the cross the word "his" and below the cross the word "mark" and then add the testator's name so that the cross comes between the Christian and surname.

§69. Guiding Testator's Hand.

Guiding testator's hand by another is the same as signing by the testator⁵³.

§70. Place of Signature on Will.

Where a testatrix wrote her name where it appeared in the body of a will, which was not otherwise signed, the signing is not sufficient and valid⁵⁴. Again where the signature of the testator came just below the line of union in the pasting of two sheets together, the signature was deemed valid⁵⁵.

§71. Attestation and Subscription.

At common law it is not essential to the validity of a will that it should be attested by witnesses⁵⁶. Under the statute it is provided that the paper must be attested and subscribed in the presence of the testator, by two or more competent

52. *Jenkins v. Gaisford*, 3 Swale & Tr. 93.

53. *Wilson v. Beddord*, 12 Sim. 28, 10 L. J. Ch. 305, 5 Jur. 624; *Higgins v. Carleton*, 28 Md. 115.

54. *Schermerhorn v. Merritt*, 23 Mich. 310, 82 N. W. 513. Rehearing denied 83 N. W. 405.

55. *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 8817.

56. *Rue High*, 2 Doug. 515.

witnesses. Thus where a will was made devising all of the testator's property and it was sought to establish a devise by an instrument which was not witnessed, that it was the wish of the testator to have a certain part of the property applied to the benefit of a certain school, this instrument was declared void as affecting the will or the estate of the devisee therein named⁵⁷. Two things are required of each of the witnesses, attestation and subscription. It is essential that the paper must be subscribed by two or more witnesses in the testator's presence, and they cannot delegate their duty to another. Thus the statute requires the witnesses to subscribe the instrument in the presence of the testator. They cannot subscribe by having their signatures written by another or by themselves at some other time, and adopted for the occasion as may be done by the testator, for it is clear that the witnesses must not only subscribe, but the testator must authorize the witnesses to sign and thereby he must become a party to their subscription—in fact, his mind must concur in the very act of their subscription. Thus where a subscribing witness writes his name in the absence of the testator, and in anticipation of the testator affixing his signature, he is not an attesting witness, although he afterwards acknowledges the subscribing in the presence of the testator and of the other subscribing witnesses⁵⁸. It may be said that a witness may subscribe his name by a mark or by initials or by a fictitious name, if not assumed for the purpose of impersonating another. In the event the witness cannot write, his hand may be guided by another⁵⁹.

57. *Finegan v. Thiesen*, 92 Allen, 49, 87 Am. Dec. 687.
Mich. 173, 52 N. W. 619.

58. *Chase v. Kittredge*, 11 117.
59. *Harrison v. Elvin*, 3 Q. B.

§72. Distinction Between Attestation and Subscription.

The statute provides that the instrument must be attested in the presence of the testator. The words "attest" and "subscribe" although used in connection in the statute are not essentially different in meaning in this relation, although it has been said that attestation is the mental act of the witnesses, i. e., the act of perceiving the performance of the various acts that enter into the execution of a will or the comprehension by them of what is said and done at the time of the execution of the will both by the testator and themselves, while subscription is the physical act of signing the will as an attesting witness, for the purpose of identifying the attested instrument. However, it may be said that these terms attestation and subscription are practically synonymous⁶⁰.

§73. Competency of Subscribing Witnesses.

A competent witness is one whose evidence is admissible. Thus, a legatee is a competent witness to a will where the statute renders the legacy to a witness void⁶¹. It may be inferred that the word "competent" and "creditable" bear a close relation, for competent applied to attesting witnesses means no more than creditable in that every witness is credited according to the impression he leaves of candor and intelligence^{61a}.

§74. Time of Competency.

A witness must be competent at the time of signing his name and attesting the will. The law only requires him to

60. *Skinner v. American Bible Society*, 92 Wis. 209.

61a. *Abbott v. Abbott*, 41 Mich. 540, 72 N. W. 189.

61. *Rue High*, 2 Doug. 515.

be competent at that time and in the event that he becomes incompetent thereafter, the will is not thereby made invalid⁶². It is said that "the death of an attesting witness, or of all of the attesting witnesses, is not to defeat the validity of the will if in fact duly executed. It changes the form of the proof, and allows of the introduction of secondary evidence of the due attestation and execution of the will. Such attestation is then to be shown as it would be in the case of deeds, by proof of the handwriting of the witness. That being shown, *prima facie*, it is to be taken to be true, and to have been put there for the purpose stated, in connection with the signature. It is to be assumed, as regards the witness, that he duly attested the will in the presence of, and at the request of, the testator. In considering the sufficiency and weight of the evidence to establish the due and proper execution of the will, the fact of the death of the witness, and the presumptions that arise from proof of his handwriting, are somewhat material. As regards the witness, if nothing appears in other parts of the evidence to control the presumption resulting from proof of his handwriting, it may be taken that, as to his attestation, it was properly made to the signature by the testator"⁶³. Neither will a will be defeated because, after a lapse of time the witness may have forgotten the facts attending the execution⁶⁴.

§75. What Persons Are Competent to be Attesting Witnesses.

All persons of sound mind, and who are old and intelligent enough to receive a just impression of the facts of

62. *Sullivan v. Sullivan*, 114 Mich. 189, 72 N. W. 189.

63. *Sullivan v. Sullivan*, 115 Mich. 189.

64. *Sullivan v. Sullivan*, 114

execution and can detail them truthfully, are competent to be subscribing witnesses, but to this rule there is one exception and that is that any person having an immediate interest under the will is not competent to act as such witness.

§76. Number of Attesting Witnesses.

The statute provides that the will must be attested by two or more competent witnesses. A less number of witnesses than the statutes require will invalidate the will⁶⁵.

§77. Value of Testimony of Subscribing Witnesses.

The evidence of subscribing witnesses is not conclusive either way nor does the law presume that they are either more or less truthful than others. Nevertheless, it presumes that they had when they signed, full knowledge of what they were doing, and in case they are dead their attestation when proved is *prima facie* evidence that all was done as it should be⁶⁶.

§78. Will Established by Evidence Other Than That of Attesting Witnesses.

The general rule is that in all contested cases the case is open for general witnesses, and when the testimony is all in, each witness is credited according to the impression he leaves of candor and intelligence, and not according to his being an attesting witness⁶⁷.

Mich. 189, 72 N. W. 189. *In re* Kennedy's Estate, 159 Mich. 548.

65. *College v. McKinstry*, 75 Md. 188.

541, 2 N. W. 810; *Lawyer v.*

Smith, 8 Mich. 411, 77 Am. Dec. 460.

67. *Abbott v. Abbott*, 41 Mich.

541, 2 N. W. 810.

§79. Evidence of Completion.

It may be said that where it is conclusively shown that a will was signed and executed by the maker, and subscribed and attested by witnesses, as prescribed by law, that is, in law, conclusive evidence of the fact that it was completed to the satisfaction of the maker⁶⁸.

§80. Presence.

The word "presence" is used three different times in the statute:

(1) A person authorized by the testator must sign the will in his presence.

(2) When signing the will, the testator must do so in the presence of the attesting witnesses.

(3) When subscribing their names as witnesses, they must do so in presence of the testator.

There is involved in the conception of "presence" both a mental and physical presentation in that the physical phenomena may be merely within the range of perception or cognition or may be actually within the range of vision. The court said in a case⁶⁹ that "the condition and position of the testator when the will is attested, and in reference to the act of signing by the witness, and their locality when signing, must be such that he has knowledge of what is going forward, and is mentally observant of the specific act in progress, and unless he is blind the signing by the witnesses must occur where the testator, as he is circumstanced,

68. *Maynard v. Vinton*, 60 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401.

69. *Aiken v. Weckerly*, 19 Mich. 504; *Maynard v. Vinton*, 60 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401.

may see them sign if he chooses to do so. If, in this state of things, some change in the testator's posture is requisite to bring the action of the witnesses within the scope of his vision and such movement is not prevented by his physical infirmity, but is caused by an indisposition or indifference on his part to take usual notice of the proceedings, the act of witnessing it is to be considered as done in his presence. If, however, the testator's ability to see the witnesses subscribe is dependent upon his ability to make the requisite movement, then, if his ailment so operates upon him as to prevent this movement, and on this account he does not see the witness subscribe, the will is not witnessed in his presence." But vision as the exclusive test of presence has been abandoned, for in the definition of the phrase "in the presence of" due regard must be had to the circumstances of each particular case as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. The statutes are substantially met if the attesting witnesses sign within the hearing, knowledge and understanding of the testator, and so near as not to be substantially away from him, they are considered to be in his presence⁷⁰.

§81. Presence in Cases of Blindness.

The authorities have established the rule that if the testator, who is blind, is sufficiently aware of the presence of the subscribing witnesses, by means of his remaining senses,

⁷⁰. *Cook v. Winchester*, 81 A. 822.
Mich. 581, 46 N. W. 106, 8 L. R.

to know what is taking place, the statute is sufficiently complied with, so as to render the execution of the will valid⁷¹.

§82. Witnesses to Sign in Presence of Each Other.

If the statute does not specifically require the signing of the witnesses in presence of each other, they are not bound to do so, but may sign at different times and places⁷².

§83. Attestation Clause.

In conclusion it may be said that all that is requisite to the due execution of a will is the actual signature of the same, written by the testator, or by some one in his presence and by his express direction, and that the will be attested and subscribed in the presence of the testator, by three or more competent witnesses, for the law requires such instruments to be executed and attested with such precautions as will usually guard against fraud⁷³. In speaking of an attesting clause, Prof. Schouler said: "Nevertheless, the use of an attesting clause, with full recitals of the particulars usual in a careful execution, is highly to be commended, both as a guide in pursuing the formalities needful in so solemn a transaction, and for the sake besides of furnishing presumptive testimony that all has been rightly done, when the subscribing witnesses are dead, forgetful, or beyond the reach of process. Nor matters it that the execution, as thus recited, becomes more formal than the local statutes insist upon; for in simple details it is wiser to be too particular than not particular enough. As a statement

71. *Reynolds v. Reynolds*, 1 Ves. 454; *Willis v. Mott*, 36 N. Y. 486.

72. *Grayson v. Atkinson*, 2 Ves. 486.
73. *Abbott v. Abbott*, 41 Mich. 541, 2 N. W. 810.

of facts transpiring at the time when the will was executed, the attestation clause is useful as a memorandum to aid the attesting witnesses themselves in recalling the circumstances at the time of probate; besides indicating that whatever directed the execution understood what formalities were needful and saw them pursued⁷⁴."

§84. Will Defectively Executed.

Probate Courts are not empowered to construe wills when presented for probate. Parties in interest may appear when a will is presented for probate and contest it on the ground that it was not properly executed, or was obtained through undue influence, or was forged, or that the testator was incompetent⁷⁵.

§85. Acknowledgment.

In case of defective execution, subsequent acknowledgment is insufficient⁷⁶.

§86. Publication.

In this state no publication of a will is required to give it effect⁷⁷.

§87. Execution of Mystic or Sealed Testaments.

It is contemplated in Act 25 of 1883 providing for the antemortem probate of wills that the widow's statutory right to administer or to nominate guardians is preserved, but it

74. Schouler's Wills.

Mich. 139, 60 Am. Rep. 276, 26

75. Dudley v. Gates, 124 Mich.

N. W. 401.

76. Maynard v. Vinton, 60

77. *In re* Kennedy's Estate, 159 Mich. 548.

is inoperative and void, for the reason that it fails to make provision for notice to the wife of the testator, and an opportunity for her to be heard⁷⁸.

§88. Delegating Power to Appoint Executor.

The authority to appoint an executor may be delegated by the testator, for where a clause in a will reads, "I make no selection of an executor of this will, but leave it for the judge of probate who may be acting when this will becomes operative to make an appointment of some suitable person for the purpose," it confers upon the judge of probate the power of making such appointment⁷⁹.

78. *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 56 Am. Rep.

378, 23 N. W. 28.

79. *Brown v. Just*, 118 Mich. 678, 77 N. W. 263.

CHAPTER V.

REVOCATION AND REVIVAL.

- §89. Animus Revocandi, Evidence, Revocation, Statute.
- §90. Construction of Statute. Common Law Rule.
- §91. Effect of a Will Once Revoked by Subsequent One.
- §92. Revocation by Making Another Will.
- §93. Execution of Revoking Instrument.
- §94. Leaving of Will.
- §95. Effect of Subsequent Will as to Revocation. General Rule.
- §96. Revocation by Conveyance.
- §97. Will Revoking Conveyance.
- §98. Implied Revocation.
- §99. Revocation as to Marriage and Birth of Issue.
- §100. Agreement as to Revocation—Statute of Frauds.
- §101. Agreement to Render Will Irrevocable.
- §102. Revocation of Mutual Wills.
- §103. Power of Revocation.
- §104. Changes Not Contemplated by the Law.
- §105. Statute Relating to Omission of Children.
- §106. Intent Under Statute as to Revocation.
- §107. Statute Relating to Exclusion of Children.
- §108. Revival of Revoked Will.

§89. Animus Revocandi, Evidence, Revocation, Statute.

The *animus revocandi* may be defined as that state of mind to revoke, recall or annul, i. e. the determination to revoke or recall that which was done and expressed in a testamentary document under a previous determination of mind, the *animus testandi*. Evidence is admissible to show the intent by facts and circumstances from which the *animus revocandi* may be inferred. Thus, pieces torn out of a will at the top, and the separation of the half sheets are evidence of violence, but from these acts alone without showing

some express declaration on the part of the testator no intent can be inferred, for the question whether done by the testator or some other person; and if done by him, whether accidentally, or intentionally, and for the purpose of revoking the will as well as the declarations which were said to have been made should go to the jury and be determined by them¹.

Revocation may be defined as that quality of a will which makes it ambulatory. It may be divided into express and implied. Express revocation is founded upon some document or act which clearly shows the intention of revocation, i. e. *animus revocandi*. But where a husband and wife have made mutual wills, each devising to the other all his or her property, an express revocation is not effected by his conveying to her half his property and by her releasing to him her interest in the remaining half, their deed not mentioning the wills². Implied revocation is founded upon the reasonable presumption of an alteration of the mind of the testator, arising from conditions since the making of the will, producing a change in his previous obligations and duties³. Again, the revocation may be accomplished without the *animus revocandi* in the following manner:

First, by the testator being incompetent to make a will at the time he performs the act of revocation.

Second, by the testator being competent to perform the act of revocation under a mistake of fact.

The rules that apply here are the same as those which

1. Lawyer v. Smith, 8 Mich. 412. Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699.

2. Lansing v. Haynes, 95 Mich. 16, 35 Am. St. Rep. 545, 545.

3. Lansing v. Haynes, 95 Mich. 16, 35 Am. St. Rep. 545,

relate to the capacity for making a will⁴. It is manifest that the act of revocation may not consist in a mere physical destruction, however complete, for it may have been occasioned by mistake or fraud, or as in the case of a testator who since the making of the will has become insane, it may be accomplished without any lawful intent whatever. Again, the mere intent without some physical act tending to the destruction of the will, and sufficient to fulfill the requirements of the statute is obviously inadequate⁵, nor where a will is cancelled or destroyed without the previous permission and authority of testator, it is clear that acts of that nature do not effect a revocation, because they are done without the intention of the testator to revoke⁶.

The statute⁷ provides that no will nor any part thereof shall be revoked, unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed by law; or by some other writing, signed, attested and subscribed in the manner provided in this statute for the execution of a will; excepting only that nothing contained in this section of the statute shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. It is apparent that the execution of a paper in the form of a will under the provisions of our statute does not place the instrument beyond the control of the testator, whether he retains possession of it himself or delivers it over to the persons for whose benefit it has been made or to another person for

54 N. W. 699.

4. See chapter II.

5. Potter's Will, 33 N. Y. S. R. 936, 12 N. Y. Supp. 105.

6. Cheever v. North, 106 Mich. 309, 58 Am. St. Rep. 499,

37 L. R. A. 56, 64 N. W. 455.

7. C. L. '97, §9270.

them. It remains at all times subject to his control. If he retains possession of it, he may revoke it in one of the ways specified in the statute⁸.

§90. Construction of Statute. Common Law Rule.

The statute has been construed as having reference to the common law rule which is that all wills are, in their nature, ambulatory until the death of the testator, at which time, and not before, the testament becomes operative, and that a latter will revokes a prior, inconsistent will⁹.

§91. Effect of a Will Once Revoked by Subsequent One.

The rule may be stated that where a will is once revoked by a subsequent one, it is not revived by the revocation of the last will¹⁰. In this relation it has been said that "there seems to have been a material distinction, and on good ground, between the state of a former will, after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have had the effect to do

8. *In re Kennedy's Estate*, 37 L. R. A. 56, 64 N. W. 455.
159 Mich. 548.

9. *Cheever v. North*, 106 Mich. 309, 58 Am. St. Rep. 499,
Mich. 390, 58 Am. St. Rep. 499, 37 L. R. A. 56, 64 N. W. 455.

away with its predecessor. Being cut off before having its dispositions of property awakened into life, it could have no affirmative operation, through its dispositions, upon the estate"¹¹. But where the execution of a will has been conclusively established and it has been regularly probated, and a later will is afterwards produced which does not revoke the former one in terms, the question of revocation cannot be determined in a mere proceeding for the probate of the later will if there is any room for a dispute as to construction¹².

§92. Revocation by Making Another Will.

Where a testator has parted with the possession of the will, he can revoke it by making another¹³.

§93. Execution of Revoking Instrument.

It is apparent that where, in proceeding to produce a will, there is sufficient evidence of the suppression or destruction of a later and revoking will, the presumption that such will was legally drawn and executed is permissible¹⁴.

§94. Extrinsic Evidence as to Revocation.

A will twenty-five years old was found after the death of the testatrix in a barrel among waste papers, and either worn or torn into several pieces which were scattered loose among the papers in the barrel, it was determined that the declarations of testatrix that she had destroyed the will were not admissible as proof in themselves of a revocation, but such

11. *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799.

12. *Besancon v. Brownson*, 39 Mich. 388.

13. *In re Kennedy's Estate*, 159 Mich. 548.

14. *Lambie's Estate*, 97 Mich. 49, 56 N. W. 223.

declarations may be received in connection with proof of the torn and mutilated condition of the will to aid in determining the testator's intention to revoke¹⁵.

§95. Effect of Subsequent Will as to Revocation. General Rule.

The general rule is that a will which is expressly revoked by a later one is void and of no effect¹⁶. This rule applies where the later will has been lost or destroyed¹⁷, also where the principal bequest in the later will has been declared void¹⁸. A will, denied probate on the ground of undue influence, and containing a clause expressly revoking all former wills makes both void and ineffectual.

§96. Revocation by Conveyance.

The general rule is well established that a conveyance of all property devised, revokes the will *in toto*, and conveyance of part of property devised revokes the will *pro tanto*²⁰. It has been said that "the doctrine, hard and unreasonable as it appears in some of its excrescences on this subject, and notwithstanding it has been repeatedly assailed by great weight of argument, has nevertheless stood the ground immovable; on the strength of authority, as if it had been one of the essential landmarks of property. The cases have been investigated and discussed with the utmost research and

15. *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699.

16. *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698.

17. *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698.

18. *Dudley v. Gates*, 124

Mich. 440, 83 N. W. 97.

19. *Lyon v. Dada*, 127 Mich. 395, 86 N. W. 946.

20. *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293; *Lansing v. Haynes*, 95 Mich. 18, 54 N. W. 699, 35 Am. St. Rep. 545.

ability by the courts of law and equity and the principle again and again recognized and confirmed that, by a conveyance of the estate devised, the will was revoked, because the estate was altered, though the testator took it back by the same instrument, or by a declaration of uses. The revocation is upon the technical ground that the estate has been altered or newly modeled since the execution of the will. The rule has been carried so far that, if the testator suffered a recovery for the very purpose of confirming the will, it was still a revocation, for there was not a continuance of the same unaltered interest. There is an exception to the rule in the case of mortgages and charges on the estate, which are only a revocation in equity *pro tanto*, or *quoad*, the special purpose, and they are taken out of the general rule on the fact of being securities only. Those doctrines of the English cases have been reviewed in this country, and assumed to be binding, as part of the settled jurisprudence of the land"²¹. A will is satisfied and not overturned or revoked where the allowance of a conveyance of property as a satisfaction of a devise or legacy would be equivalent to a revocation of wills in part, and it would have to be proved in the manner provided by our statute for the revocation of wills, that is, by the destruction of the will or the making of a new will²².

§97. Will Revoking Conveyance.

Where a man conveyed to one of his sons certain lands upon the consideration that the son would release and relinquish all his rights to heirship, and subsequently made a will

21. 4 Kent's Comm. 530.

108 Mich. 473, 32 L. R. A. 232; 66

22. Carmichael v. Lathrop,

N. W. 350.

disposing of his property to his wife and son who was to receive a certain sum of the estate when he arrived of age, the remainder of the estate after the wife's death was to pass to the son who was to share in it "with the rest of the heirs," the effect of the latter clause was to practically revoke the conveyance made to the son^{22a}.

A clause in a deed providing that the deed shall not become operative until after the grantor's death is a testamentary disposition of property and may be revoked by a later will^{22b}.

§98. Implied Revocation.

Implied revocation may be effected from changes of condition on account of divorce²³, but not on account of a subsequent marriage of a woman, so long as no children are born²⁴. However, where a testatrix executed a will while sole, her subsequent marriage and birth of issue resulted in an implied revocation²⁵.

§99. Revocation as to Marriage and Birth of Issue.

The principle is well established that a married woman can make a will as if single, but her will is not revoked by her subsequent marriage²⁶. A second wife's right to dower in lands of which the testator died seized cannot be impaired and are the same as if the testator died intestate, where a

22a. Appeal of Turner, 48 Mich. 360, 19 N. W. 493.

22b. Moody v. Macomber, 159 Mich. 657.

23. Lansing v. Haynes, 95 Mich. 16, 35 Am. St. Rep. 545; 54 N. W. 699; Wirth v. Wirth, 149 Mich. 687, 113 N. W. 306.

24. Noyes v. Southworth, 55 Mich. 173, 54 Am. Rep. 359; 20 N. W. 891.

25. Durfee v. Risch, 142 Mich. 504, 5 L. R. A. (N. S.) 1084.

26. Noyes v. Southworth, 55 Mich. 173, 54 Am. Rep. 359, 20 N. W. 891.

testator devised all his lands to his children by his first wife before his second marriage²⁷. Subsequent marriage and issue born of a *feme sole*, who executed a will before marriage, revokes the will by operation of law²⁸ under the statute²⁹.

§100. Agreement as to Revocation—Statute of Frauds.

It is manifest that a will made in pursuance of an oral agreement may be revoked by the testator³⁰ and where lands are devised it is void under the statute of frauds³¹, nor will a specific performance of a parol contract be granted where a will was executed in pursuance of the contract and nothing was done by way of performance except the payment of the consideration, the will being refused probate on the ground of implied revocation by marriage and birth of issue³². Where a will made to carry out an agreement to leave property to a party in consideration of his taking care of testator was destroyed and the land conveyed to another with notice, but later set aside on account of the mental incompetency of the testator the legal existence of the will was left to the determination of the probate court³³.

§101. Agreement to Render Will Irrevocable.

The rule is apparent that no testator can by contract ren-

27. Burrall v. Bender, 61 Mich. 608, 28 N. W. 731; Metter v. Stepper, 32 Mich. 194.

28. Durfee v. Risch, 142 Mich. 504, 5 L. R. A. (N. S.) 1084, 105 N. W. 1114, see Grindling v. Reky, 149 Mich. 64, 113 N. W. 290.

29. C. L. '97, §§9270, 9285.

30. DeMoss v. Robinson, 46 Mich. 62, 41 Am. Rep. 144,; 8 N. W. 72.

31. DeMoss v. Robinson, 46 Mich. 62.

32. Grindling v. Reky, 149 Mich. 64, 113 N. W. 290.

33. Leonardson v. Hulin, 64 Mich. 1, 31 N. W. 26.

der his will irrevocable during his life, for the very reason that it is the essence of a will to be revocable until death³⁴.

§102. Revocation of Mutual Wills.

Mutual wills having been made by husband and wife, it is beyond the jurisdiction of the probate court to decide whether mutual wills form a contract and whether a proponent has by revoking her own will estopped herself from claiming under the other³⁵.

§103. Power of Revocation.

Revocation is not allowed to alter a contract which forms part of a will, and is not performed by the other party³⁶. Where to secure a surety, the principal inserted an agreement in her will to pay him upon her death a certain sum, such sum to be a first lien on all her estate left at the time of her death and to be paid to the surety out of said estate after paying her funeral expenses, it was determined that no lien existed on the property during the lifetime of testatrix, and that chancery could not interfere to prevent her from disposing of her property as she saw fit³⁷. The mortgagee could not, by the revocation of the will, alter or annul her contract with the mortgagor as to the time of payment of the sum specified, there having been no default on his part, where at the time of the execution of a mortgage conditioned in part for the payment of \$4500 to the legatees of the mortgage, and as a part of the same transaction the

34. *Mandelbaum v. McDowell*, 29 Mich. 78.

35. *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545,

54 N. W. 699.

36. *Keagle v. Pessell*, 91 Mich. 618, 52 N. W. 58.

37. *Nash v. Burchard*, 37 Mich. 85, 49 N. W. 492.

mortgagee made her will, by which she provided for the payment to certain legatees of legacies to the amount named in the mortgage, in ten equal annual payments after the death of herself and her husband, free from interest until due³⁸.

§104. Changes Not Contemplated by the Law.

Where a chief beneficiary died before the testator, no revocation of the will was effectual³⁹.

§105. Statute Relating to Omission of Children.

The statute⁴⁰, providing that when any testator shall omit to provide in his will for any of his children or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section, is applicable when the testator fails to make any provisions for his children, but where the will makes provision for the support and education of all of the children of the testator until they attain their majority, the statute does not apply⁴¹ and does not revoke the will.

§106. Intent Under Statute as to Revocation.

The intent of the testator in relation to the clause in the statute that, "it shall appear that such omission was not intentional, but was made by mistake or omission" is one of

38. *Keagle v. Pessell*, 91 Mich. 618, 52 N. W. 58.

40. C. L. '97, §9286.

39. *Brown v. Just*, 118 Mich. 672, 77 N. W. 253.

41. *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385.

facts to be submitted to a jury upon all evidence⁴². Thus the statute revoking the will depends upon the testator's intent.

§107. Statute Relating to Exclusion of Children.

Under the common law rule, marriage and the birth of children, after the will was made, had the power to revoke the will. The revocation was absolute upon the happening of marriage and birth of issue, and did not depend upon evidence of testator's intention. The general tendency of statute law is in the same direction. It is the tendency of courts to carefully protect the rights of after-born children. It is manifest that the legislative intent is that, if the testator intended to disinherit the unborn child, he should indicate it in his will, and that it should not be left to extraneous testimony to show his intent⁴³. Thus, the intention to exclude children born after the execution of the will must be specified in the will, while if the intention is to exclude those in existence at the time the will is executed no provision to that effect need appear in the will.

§108. Revival of Revoked Will.

The general rule is that a will containing a clause of revocation operates to revoke a former will, instantaneously and of its own force⁴⁴, but where a will contains no express clause of revocation, it does not of its own force operate to revoke a former will, and the subsequent destruction of the

42. *Carpenter v. Snow*, 117 Mich. 489, 41 L. R. A. 820.

43. *Carpenter v. Snow*, 117

Mich. 489, 41 L. R. A. 820.

44. *Cheever v. North*, 106

Mich. 590, 58 Am. St. Rep. 409, 37 L. R. A. 561, 64 N. W. 455.

later will by the testator, will effect a revival of the earlier will⁴⁵. The mere revocation of a later will by destroying it will not operate to revive a prior will, although the testator makes an express verbal declaration in presence of witnesses that he wishes the prior will to stand⁴⁶. The doctrine that a former will may be revived by the testator after the destruction of a later revoking will is well recognized. Thus, certain acts and declarations of the testator, made under certain circumstances, in the presence of interested witnesses, clearly indicated the intent and purpose not to die intestate, but to revive the former will, and such acts and declarations amount to and were a republication of said will, which thereby revived and operated as a last will⁴⁷.

45. Scott v. Fink, 43 Mich. 241, 7 N. W. 703.

46. Denley v. Jefferson, 150 Mich. 590.

47. Denley v. Jefferson, 150 Mich. 590, 121 Am. St. Rep. 640, 114 N. W. 470. (A dissenting opinion.)

CHAPTER VI.

DESIGNATION OF BENEFICIARIES AND THEIR SHARES.

- §109. Designation in General.
- §110. Heirs.
- §111. Children and Grandchildren.
- §112. Disposition To a Class. Definition.
- §113. Time of Taking as to Disposition to a Class.
- §114. Time for Distribution.
- §115. Distribution Per Stripes or Per Capita.
- §116. Miscellaneous. Religious Societies. Municipal Corporations.
- §117. Shares and Division of Estates.
- §118. Restrictions of Beneficiaries to Specific Amounts.
- §119. Exclusion of Heirs.

§109. Designation in General.

A testator when making his will should be careful to designate his beneficiary or beneficiaries so that he or they can be easily identified and easily made capable of certainty without recourse to parol evidence which may be introduced to render the beneficiary more certain¹, or to correct a misnomer². Dispositions are void for uncertainty where the beneficiary is doubtful³. In designating the beneficiaries such words as, "children and grand-children," "heirs," "issue," "descendants," "next-of-kin," "legal representatives" or "personal representatives," etc., are used by testators.

1. *Holmes v. Mead*, 52 N. Y. 434.
Y. 332.

2. *Lafebre v. Lafebre*, 59 N. Y. 29.

3. *Tilden v. Green*, 130 N.

§110. Heirs.

An heir is he upon whom the law casts the estate immediately upon the death of the ancestor⁴. In general heirs as used in common speech denotes those who come in any manner to the ownership of any property by reason of the death of the owner, and that may then include next of kin and legatees as well as those who take by descent. Heirs in a legal sense is a technical word, and when it is made use of in formal documents, there is a presumption more or less strong according to the circumstances, that it is employed in a technical sense. The word as employed in wills, which are often very informal instruments, is used with very little regard to its technical meaning⁵. Usually it is the context of the will that determines the meaning of the word and when it does, effect must be given to the instrument accordingly⁶. Thus, when the word "heirs" is unexplained or uncontrolled by the context, the construction placed upon it must be a technical one, otherwise in wills its meaning is to be determined by the intention of the testator as manifested by the will as a whole. "Lawful heirs" does not include wife⁷, neither does "lawful heirs" include adopted children where the adoption was revoked⁸. "Lawful heirs

4. 2 Black Comm. 201.

5. Hascall v. Cox, 49 Mich. 435, 13 N. W. 807. For technical meaning see Fullager v. Stockdale, 138 Mich. 363, 101 N. W. 576.

6. Hascall v. Cox, 49 Mich. 435, 13 N. W. 807.

7. Bailey v. Bailey, 25 Mich. 185.

8. Morrison v. Session's Estate, 70 Mich. 297, 14 Am. St.

Rep. 500. See Van Derlyn v. Mack, 137 Mich. 146, 66 L. R. A. 437, 109 Am. St. Rep. 669, 100 N. W. 278. In which case it was decided that an adopted child shall become the heir at law of the person who adopts it, and for that reason the adopted child is not heir by right of representation of the kindred of the person who makes the adoption.

according to law" includes husband⁹. Children may mean heirs where a testator devised lands "unto the heirs of my son B. that his wife S. has by him or may have by him hereafter," and a further provision was that "my son B. shall have his support and living out of the estate that I have hereby given to his children, so long as he shall live¹⁰." Again, the word "heirs" may mean "children," where a will described certain beneficiaries as the heirs of another person, whom the testator assumes to be living¹¹. Brothers and sisters, where the testator left no heirs, may be included in the term "heirs"¹², so the widow may be an "heir," where a statute makes a widow of a husband dying intestate a distributee¹³. A husband may also be entitled to take as "heir"¹⁴. The word "heirs" when used in a popular sense by a testator designates and includes blood relations¹⁵. It is also used to denote issue, in which sense it made all parts of the residuary clause, and of the whole will operative so as to bring in perfect harmony all the parts of the will with what may be fairly deemed the meaning of the testator¹⁶.

§111. Children and Grandchildren.

"Children and grandchildren include unborn children who shall be in being at the time of the death of the daughter of

9. *Turner v. Burr*, 141 Mich. 106, 104 N. W. 379.

10. *Rose v. Eaton*, 77 Mich. 247, 43 N. W. 972.

11. *See v. Derr*, 57 Mich. 369, 24 N. W. 108; *Fullager v. Stockdale*, 138 Mich. 363, 101 N. W. 576.

12. *Silvers v. Michigan Mut. Ben. Ass'n*, 94 Mich. 39, 53 N.

W. 935.

13. *Lyons v. Yerex*, 100 Mich. 214, 43 Am. St. Rep. 452, 58 N. W. 1112.

14. *Turner v. Burr*, 141 Mich. 106, 104 N. W. 379.

15. *Lyons v. Yerex*, 100 Mich. 214, 43 Am. St. Rep. 452, 58 N. W. 1112.

16. *Goodell v. Hibbard*, 32 Mich. 47.

the testator where the will makes provision that after the death of the daughter of the testator he gives certain property to his children and grandchildren¹⁷. All the children shared in an estate where the remainder read to his "children hereinafter named and their issue, share and share alike" and in a later item the testator mentioned all of his children by name¹⁸. A "child" includes *en ventre sa mere* when wife of testator died, where a bequest of a certain sum to each of the children of the daughter of the testator, in the event of the death of his wife, is made¹⁹, so under the same circumstances is included not only the children in being at the death of the testator, but those born subsequently during the lifetime of the widow²⁰.

§112. Disposition To a Class. Definition.

This mode of disposition does not confine itself to mentioning the members of the class by name or by description, but by the general name "children," "cousins," "nephews," etc. It is said that "in legal contemplation a gift to a class is an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number²¹. A child born after the death of a testator is allowed to take its share in a fund

17. *Cheever v. Washtenaw*, Circuit Judge, 45 Mich. 6, 7 N. W. 186.

18. *Sondheim v. Fechenbach*, 137 Mich. 384, 100 N. W. 586.

19. *McLain v. Howald*, 120 Mich. 274, 77 Am. St. Rep. 597,

79 N. W. 182.

20. *McLain v. Howald*, 120 Mich. 274, 77 Am. St. Rep. 597, 79 N. W. 182.

21. *In re Brown*, 154 N. Y. 313.

which was given by will for the benefit of the children of a designated person²².

§113. Time of Taking as to Disposition to a Class.

Those children surviving at the death of the testatrix take, while those who were alive when the will was made do not take, where a devise of certain land was made "to the surviving children of testatrix's brothers"²³.

§114. Time for Distribution.

Postponing the time of distribution to some period subsequent to the death of the testator in a devise renders the dispositions available to all who are in existence at the time allowed for the distribution²⁴. Children "hereafter to be born or begotten" is given the construction to include those already begotten²⁵.

§115. Distribution Per Stirpes or Per Capita.

In general *per stirpes* means according to representation and *per capita* means according to heads or individuals. The clause in a will providing that estate of testator "be equally divided among his heirs, to wit, J. B., the children of C. B. jr.," naming the other children, is construed to mean that the grandchildren of the testator are to take *per stirpes* the share of their deceased parents as legatees²⁶.

22. Knorr v. Millard, 57 Mich. 265, 23 N. W. 807.

23. Eberts v. Eberts, 42 Mich. 404, 4 N. W. 172.

24. L'Estorneau v. Henquet, 89 Mich. 428, 29 Am. St. Rep. 310, 50 N. W. 1077; Fitzhugh v.

Townsend, 59 Mich. 427, 27 N. W. 561.

25. Knorr v. Millard, 57 Mich. 265, 18 N. W. 349; Hovey v. Neillis, 98 Mich. 374, 57 N. W. 55.

26. Eyer v. Beck, 70 Mich. 179, 38 N. W. 20.

Where an estate was devised by a testatrix to her son and five grandchildren, naming them under the following clause: one-third to the son, and two-thirds to the grandchildren, the clause is construed to mean that the grandchildren are to take their share *per capita*²⁷.

§116. Miscellaneous. Religious Societies. Municipal Corporations.

A bequest passed rightfully to the convention where the residuary clause read to the "Universalist Japan Mission Fund" for the support of the "Universalist Mission in Japan²⁸." Where a bequest of fifteen thousand dollars in a will was made to a village for the purpose of erecting a school building, to be used as a high school, it was not deemed void for uncertainty or indefiniteness²⁹.

§117. Shares and Division of Estates.

The construction as to the shares of the beneficiaries placed upon a will, where it divided the residue of the estate of the testator into seven parts, and devising one-seventh to a father and mother, and their son, "in equal shares to each of them," is to give the seventh to the collective legatees³⁰.

§118. Restrictions of Beneficiaries to Specific Amounts.

It is clear that a will, though often made while death is not contemplated for some remote period to come, is to take effect from the time of death of the testator and not

27. Wells v. Hutton, 77 Mich. 129, 43 N. W. 768.

28. Cook v. Universalist General Convention, 138 Mich. 157, 101 N. W. 217.

29. Hatheway v. Sackett, 32 Mich. 97.

30. Mann v. Hyde, 71 Mich. 278, 39 N. W. 78.

from the time of execution of the will. Therefore it may happen that a will made by a rich man, may take effect after he has died poor. If he was reasonably thoughtful and prudent in making it, it will probably be found that he made provision, while giving away what then promised to be a large fortune, for the possibility that a mere wreck of a fortune might be left for distribution. In such a case a disposition that when made seemed princely may dwindle into insignificance and a provision for a small but certain legacy as the alternative to one probably worthless, may be a proper dictate of kindness and generosity. This change of circumstances may be contemplated in the making of a will by the testator, and he may make provision with a view to possible contingencies of change of fortune³¹.

§119. Exclusion of Heirs.

Where a man conveyed to one of his sons certain lands upon the consideration that he would release and relinquish all his rights to heirship, and later made a will disposing of his property to his wife and son who was to receive a certain amount of the estate when he arrived of age, the balance of the estate after the wife's death was to pass to the son who was to share in it "with the rest of the heirs," the latter clause was construed to mean that the conveyance made to the son was practically revoked by which the other son was excluded from any right of inheritance and it not only entitled him to share in the remainder of the estate but in any surplus left for distribution³².

31. *Kinney v. Kinney*, 34 Mich. 250. See *Appeal of Turner*, 48 Mich. 369, 12 N. W. 493,

in which case a similar question is involved.

32. *Appeal of Turner*, 48 Mich. 369, 12 N. W. 493.

CHAPTER VII.

DESCRIPTION OF PROPERTY.

- §120. Certainty of Description.
- §121. Description by Name of Owner.
- §122. General and Particular Words.
- §123. Inconsistent Descriptions.
- §124. Estate.
- §125. Property.
- §126. Effects.
- §127. Description of Personalty by Location or Use.
- §128. Life Insurance.
- §129. Release of Debts and Obligations.
- §130. Claims of the Testator.
- §131. Pecuniary Legacy.
- §132. Residuary Clause.

§120. Certainty of Description.

The rule is well settled that any words which will clearly indicate the intention of the testator to dispose of his estate will pass such estate. The formality of the words is not essential. It is, however, essential that the description of the property is clear and certain and not inconsistent with subsequent bequests¹. A bequest reading, "to my wife the provisions made for her by the statutes of this state I deem sufficient," and the testator added, after giving sundry legacies, the clause, "all the residue of my estate after paying the above bequests, legacies and my debts and the expenses of settling my estate," which clause was construed to mean that the wife would take the same as if the testator died

1. *Stebbins v. Stebbins*, 86 Mich. 474, 49 N. W. 294.

intestate². The land is included in a case where in a specific bequest a testatrix describes the property as being two stores erected by her on a certain street³.

§121. Description by Name of Owner.

Where a clause in a will described the property as follows: "Being the same land on which said Sidney Tewsbury now lives," the description was deemed sufficiently certain⁴.

§122. General and Particular Words.

In instances of this kind the general rule must prevail that the intention of the testator must be inferred from the whole will. Where the general words in a will purport to pass the entire estate of the testator, but the specific words forming the description contain a less amount of property than the general words, the description of the whole property is considered sufficiently described⁵, for the general description is not to be limited by the particular description⁶.

§123. Inconsistent Descriptions.

The description must prevail where a testator devised twenty acres of land to his son by metes and bounds, although previously he referred to the land in his will as "joining" other lands which he had, but this particular piece did not join any of the lands so referred to⁷.

2. Kelly v. Reynolds, 39 Mich. 404, 33 Am. Rep. 418. See Murdock v. Bilderback, 125 Mich. 45, 83 N. W. 1007.

3. Toms v. Williams, 41 Mich. 552, 2 N. W. 814

4. Tewksbury v. French, 44

Mich. 100, 6 N. W. 218.

5. Waldron v. Waldron, 45 Mich. 350, 7 N. W. 874.

6. Wales v. Templeton, 83 Mich. 177, 47 N. W. 238.

7. Wales v. Templeton, 83 Mich. 177, 47 N. W. 238

§124. Estate.

Estates in a general legal sense mean the quantity of interest which a person may have or has in property, including all the varying interests from absolute ownership down to naked possession.

§125. Property.

Property may be defined as extending to every species of valuable right and interest, including real and personal property, easements, franchises and other incorporeal hereditaments.

§126. Effects.

This word is extensively used in wills and corresponds usually in meaning to personal estate, but in a case⁸ Lord Mansfield construed the word effect to be synonymous with "worldly substance," which means whatever can be turned to value, and therefore that "real and personal effects" means all a man's property.

§127. Description of Personalty by Location or Use.

It was decided that the proceeds of wheat that was in the barn of the testator when he died, belonged to his residuary legatees where a testator left his wife all the personal property "belonging to or used in connection with" his farm and being thereon at the time of the death of the testator, to be used by her until his youngest son came of age, it being the intention of the testator to keep it in their hands until all should die⁹.

8. Hogan v. Jackson, 1 Cowp. 304.

9. Appeal of Kempf, 53 Mich. 352, 19 N. W. 31.

§128. Life Insurance.

A description in a will which reads "and all other property of which I shall die seized," passes a life insurance under a certificate, payable "to the devisees, or, if no will, to the heirs¹⁰."

§129. Release of Debts and Obligations.

The general rule is that a debt or obligation due a testator from a devisee or legatee should be clear and unambiguous¹¹. Where the will contained the clause that "all the foregoing legacies are intended and declared to be for the individual estate of the said legatees, exclusive of any indebtedness to me at this date or other," this clause did not release any of the legatees from any indebtedness due to the testator¹².

§130. Claims of the Testator.

Claims of the testator do not always pass by the will. Thus, where a testator included in his will the following statement: "It is my will that all my furniture and property be in common to my beloved wife, E. H., and daughter, J. J. H., so long as they live and keep house together," this description did not pass a claim the testator had against the Chippewa Indians to the widow and daughter¹³.

10. *Aveling v. Northwestern Masonic Aid Ass'n*, 72 Mich. 7, 1 L. R. A. 528, 40 N. W. 28.

11. *Baldwin v. Sheldon*, 48

Mich. 580, 12 N. W. 872.

12. *Baldwin v. Sheldon*, 48 Mich. 580, 12 N. W. 872.

13. *Appeal of Jameson*, 1 Mich. 99.

§131. Pecuniary Legacy.

The presumption is that all the devisees are equal holders, where a devise is made to several persons, all standing in the same relation to the devisor¹⁴.

§132. Residuary Clause.

A residuary clause is that part in a will which makes disposition of that portion of the estate which is left after paying the charges, debts, devisees, and legacies, i. e., it disposes of the *residuum*. The *residuum* in testamentary language means whatever is not specifically devised or bequeathed. There are general and particular residuary clauses. A general residuary clause disposes of all the *residuum* of the estate of the testator, whereas the particular residuary clause disposes of the *residuum* of specific property. Where a testator, after providing for the payment of his debts and funeral expenses and for certain legacies, directed that, after all debts and expenses were paid, the balance of his estate should be equally divided between two church boards, this clause was a disposition of the balance of his property, not bequeathed otherwise, except his personal effects¹⁵. The intention of the testator in a will, requiring the executors to put up a building on certain land and provided that "should it become necessary to sell real estate for the purpose of building" they might sell certain other specified premises, and the lot and buildings were to go to the grandson of the testator, providing the grandson

14. Eberts v. Fisher, 44 Mich. 551, 7 N. W. 211. See other cases relating to the same matter. *In re Gunn's Estate*, 146 Mich. 615, 110 N. W. 63;

Gregory v. Tompkins, 132 Mich. 205, 93 N. W. 245.

15. Stebbins v. Stebbins, 86 Mich. 474, 49 N. W. 294

did not die under eighteen, when, in that event, "all the real estate" was to pass to the brother of the testator, but the grandson died before the time specified, and his administrator claimed a quantity of personalty, not specifically bequeathed by the will, as belonging to the estate of his intestate as the sole heir of his grandfather, was to pass the *residuum* of personalty to be used in building the stores¹⁶. A clause in a will stating that "all the residue of my real estate and personal property not hereinbefore enumerated as hereinafter prescribed" does not entitle the beneficiary under the clause to take as residuary legatee any property—such as lapsed legacies—not enumerated in the bequest by the testator¹⁷.

16. Allen v. Stead, 38 Mich. 756.

17. Williams v. McKeand, 119 Mich. 507, 75 Am. St. Rep. 420; 78 N. W. 507.

CHAPTER VIII.

DEVICES AND LEGACIES.

- §133. Meaning and Use of the Words.
- §134. General Specific, Demonstrative and Residuary.
- §135. Types of Particular Legacies and Devises.
- §136. Cumulative and Substitutional Legacies.
- §137. Ademption. Advancement.
- §138. Lapsed and Void Legacies. Survivorship. Substitution.
- §139. Charges of Debts and Legacies Upon Specific Property.
- §140. Liabilities on Devises and Bequests.

§133. Meaning and Use of the Words.

A legacy is a bequest of goods, chattels and money by testament; while a devise is a disposition of real property by will. By bequest is meant a disposition of personalty in general. It is frequently misused in that it includes both personalty and realty, and therefore wherever the context of the will requires it, the word will be so construed as to include realty. Legacies and devises are classified as to their nature.

§134. General, Specific, Demonstrative and Residuary.

Legacies and devises are divided into: General, specific, demonstrative and residuary.

A general legacy or devise is one which may be satisfied by any part of testator's estate, corresponding either in value or general description to the provisions of the will. Thus, the following bequest, "I give and bequeath to my

said father and my mother the sum of \$3,500, and I direct my executor to pay the sum over to them out of my life insurance money payable to my executor as soon as collected," is a general legacy and, if the insurance money fails, payable out of the general assets of the estate¹.

A specific legacy or devise is a particular and specified thing singled out, or a particular fund, and, if this fund fail, or the specified thing bequeathed or devised is not in existence to be carried over to the legatee, the legacy cannot be paid out of the assets of the estate². Thus a bequest which reads, "I give and bequeath to my nephew, Herbert Wheeler, the sum of \$400, the said \$400 to be *paid by my executor assigning and transferring to the said Herbert Wheeler a certain real estate mortgage upon the farm* owned by the estate of the late D. W., which said farm is located in the Township of Homer, County of Calhoun, and State of Michigan, and which mortgage was made to me by the said D. W. about four years ago," is a specific legacy³.

A demonstrative legacy or devise does not differ materially in its nature from a general legacy or devise, for it is usually made payable out of certain specified property, either real or personal. It is defined to be a pecuniary legacy, the particular fund being pointed out from which it is to be paid⁴. Thus where a will provides that a certain bequest should be paid out of personal property on hand after the death of the widow, before any division of the personal property is made, such legacy is demonstrative⁵, and

1. *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576; *In re Corby's Estate*, 154 Mich. 353, 117 N. W. 906.

2. *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576.

3. *Wheeler v. Wood*, 104 Mich. 414, 62 N. W. 577.

4. *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576.

5. *Hibler v. Hibler*, 104 Mich. 274, 26 N. W. 361.

it is manifest that specific legacies and specific devises are not chargeable with the payment of demonstrative or general legacies, unless made so expressly or by clear implication⁶.

Residuary legacy or devise is a disposition of all the "rest" or "remainder" of all the property or of a property of a particular kind after certain specific or general legacies or devises are discharged. Thus where a disposition in a will reads as follows: "To my son J. W. his heirs, executors and assigns, I do give, devise, and bequeath all the residue of my real estate and personal property not heretofore enumerated, as hereinafter described," the form of the disposition is a residuary legacy or devise, but under this clause the residuary legatee was not entitled to take any property, such as lapsed legacies, not enumerated in the bequest to him⁷, for it may be said that where a testator expresses that he gives to A. everything he dies possessed of, and afterwards enumerates what it is that he intends to give, the bequest would be confined to the specific enumeration. However, the law regards lapsed legacies of personalty as part of the general body of the estate so that they pass to the residuary legatees⁸.

§135. Types of Particular Legacies and Devises.

A devise which provided an income for the support, education, and maintenance of the children and provisions that a portion of the estate was to be paid to each child when it arrived at a certain age with provision for minorship and

6. *Hibler v. Hibler*, 104 Mich. 274, 62 N. W. 361.

78 N. W. 553.

7. *Williams v. McKeand*, 119 Mich. 507, 75 Am. St. Rep. 420;

8. *Mann v. Hyde*, 71 Mich. 278, 39 N. W. 71.

discretionary powers to the executors, was construed by the court to mean that the son took the entire estate under the will, where all the children of the last surviving sister had died and the other children had left no issue^{8a}.

Where a bequest has been made to the wife, granting her the use, control and income of all the realty and personalty of the testator during the term of her natural life and where by a later bequest he gives to his children "all the loose money which I now have outstanding, such as notes and mortgages etc.," it is apparent that the testator intended to give his wife the use of the farm and the personal property thereon, and to the children the property described in a latter provision⁹, for the reason that the rule is applicable that the real intent and meaning of the testator, as expressed in the will, must be given effect if possible, and all the clauses of the will must be considered harmonized if possible¹⁰. Under a bequest where a testator bequeaths all the residue of his estate to his wife and then makes a later provision that at his death she make her will by which she is to give at least two-thirds of what she received from his estate to charities to be named by her, the amounts so given to be made payable upon her death—it being the testator's wish that she have and use all the income of that portion of his estate given to her by his will as long as she should live—it is manifest from the intent of the testator that she did not take an absolute estate in all the residue affected by the provision, but only in one-third thereof, and on her death without disposing of the two-thirds as directed, the

8a. *Hunter v. Hunter*, 160 Mich. 218.

9. *Gloede v. Rautenberg*, 156 Mich. 381.

10. *Smith v. Jackson*, 115 Mich.

194, 73 N. W. 228; *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111; *Barnes v. Marshall*, 102 Mich. 248, 60 N. W. 468; *Bailey v. Bailey*, 25 Mich. 185.

two-thirds reverted to the husband's estate, and as to that he died intestate¹¹. A residuary clause, which reads that the residue is to be divided "between all the children of my brothers and sisters and W. then living, share and share alike, and in case their children shall die leaving issue, living at the time of the distribution of my estate, such issue shall take the share of their deceased parents, distributes W's share among his children equally with the children of the brothers and sisters, and on like terms with them¹². Where provisions in a will provide that first the debts and funeral expenses of the testatrix shall be paid, and that if at the testatrix's death there is sufficient personal property in her possession to pay certain specified sums to certain persons, and that certain houses and land, and her household furniture is to go to the brother, who is made a residuary legatee, it is provided under C. L. '97, §9292 and correlated sections that the expenses of administration were chargeable only upon the personal property, for the intent of the testatrix is clear that the specific devise and legacy to her brother was to be kept intact if possible¹³. Bequests in a will reading "the following number of acres of land I have given my children by deed already free as a part of their share: John twenty-three acres Conrad twenty acres, Anna thirty acres, all I intend to give her by this instrument, Barbara twenty acres," do not make a disposition of the real estate of the testator, nor do they exclude Anna from participating therein¹⁴. Under a will there are certain provisions declaring that certain bequests given to the children of the testator

11. *Gilchrist v. Corliss*, 155 Mich. 126, 115 N. W. 938.

12. *Gaskill v. Weeks*, 154 Mich. 223, 117 N. W. 647.

13. *In re Corby's Estate*, 154 Mich. 353, 117 N. W. 966.

14. *Southgate v. Karp*, 154 Mich. 697, 118 N. W. 600.

to be paid when his youngest child reaches the age of 21, that the residuary estate shall go to the other children, that if the testator should die before his youngest child reaches 21, the residuary legatees should be allowed to occupy the real estate of which he died seized, and that one of the residuary legatees was requested to continue to reside upon the land and care for the others until they should arrive at majority, and if the legatee shall refuse or neglect to do as requested, the executor shall see to it that the rents and profits of the property should be used for the support of the residuary legatees until they were 21, it is decided that where the income from the property was sufficient to support all the children, it was not the intention of the testator that the income should be divided equally among all the residuary legatees, but that it should be used as necessary, and as testator might have used it if he had been living¹⁵. It is manifest that where a will devises all testatrix's realty to her daughter, and bequeaths to her all her mortgages, notes, and other securities, "with the understanding that she shall pay" certain specific legacies out of her portion of the estate, the legacies are a charge upon both the real and personal property¹⁶. Where a will has the following provisions, "I give and bequeath to my beloved wife, * * * in money three thousand dollars to be paid in accordance with the following provisions, to wit: I will and bequeath all the residue and remainder of my personal property, and all my real estate, to my only child, C., for her sole use and benefit during her life, and at her death to her child: *Provided*, that the *aforesaid* payment of \$3000 be made to my wife, or the actual interest at the rate of seven per cent. annually,

15. *Pray v. Railer*, 144 Mich. 208, 107 N. W. 1076.

16. *In re Owen's Estate*, 138 Mich. 293, 101 N. W. 525.

as she, my wife, may elect, and, at any time when my wife may want any portion of the whole of said amount of \$3000, it shall be paid to her on three months' notice, either verbal or written, or she may sell enough of said real estate to pay said amount on the failure of my daughter to pay her after the aforesaid notice," the intention of the testator is to place the sum of three thousand dollars at the widow's absolute disposal with no reference to her necessities¹⁷. A conditional power of sale vested in the executors of a last will is instanced by the following clauses: "I hereby direct that my executors convey to purchasers, by proper deeds of conveyance, what is herein directed to be sold and converted into money and to my children the several shares herein provided for them," etc., and "to sell and deed and convey, according to the true intent and meaning hereof, all and any of the property of my estate left hereby in their hands¹⁸. The legatees are entitled to an immediate distribution of the estate where the testator bequeaths to his wife all of his household goods, and gives her a life estate in the residue of his property, both real and personal, and the five persons to whom he makes specific bequests he makes residuary legatees in proportion to the sum bequeathed to them, and where it is further provided that, if any of said legatees should be dead at the time of the decease of the wife, the heirs of such deceased legatee should take the legacy bequeathed to him, and where upon admitting the will to probate the wife elected to take under the law¹⁹. A bequest of shares of stock in a barge, giving the wife of the testator in trust for her maintenance and

17. *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228.

18. *Petit v. Flint & Pere Marquette R. R. Co.*, 114 Mich. 302, 72

N. W. 238.

19. *In re Schultz Estate*, 113 Mich. 392, 71 N. W. 854.

the maintenance of a child yet unborn, and other bequests, provisions, and circumstances which have a bearing upon the construction of the will, is deemed a bequest of twenty times the number of shares of the corporation²⁰. The realty and personalty is charged with the payment of the legacy where the testatrix devised and bequeathed all her "real estate, personal property, and household effects," to her nephew who was to pay certain legacies, provided for in the will, and where upon his death the realty should go to others named²¹. Where a testator was possessed of no other property aside from his household goods and personal effects which were specifically bequeathed, except that mentioned in the tenth clause of his will, and that devised to him by his uncle subject to a life estate in his aunt, whose life expectancy was twenty years; and where after making several bequests mainly for the support and education of certain minor children, the testator, in the tenth clause of his will, bequeathed to his executors the moneys realized from his life insurance, his interests in certain specified firms, and any business connection he then had, or into which he might thereafter enter, and where the executors were authorized to collect the insurance, close out the interest in any business with which the testator might be connected, invest the proceeds, and pay the net income derived therefrom to the sister of the testator, and in case she died without having lawful issue a specified portion of the fund was bequeathed to a certain person, and the remainder was to be disposed of as his said sister should by her will direct, the intention of the testator clearly appears within the four corners of the instrument that the objects of his love and

20. *Oades v. Marsh*, 111 Mich. 168, 69 N. W. 251.

21. *Chase v. Warner*, 106 Mich. 695, 64 N. W. 730.

affection should at once receive the benefit of his bequests, and that they were to be provided for out of the only fund which was available for that purpose, i. e., the one contained in the tenth clause²². It is manifest that the legacies must yield to the necessities of the family, where a testator appointed his widow sole executrix of his will and guardian of his minor children, and directed that during their minority, from the income of the entire estate, which was placed under her control, she should maintain a home for herself and said children, provide for their education, pay certain legacies, and add the remainder of the income, if any, to the estate²³. Particular debts, legacies, and charges will be considered a charge against the estate, both real and personal, when a will provides that certain debts, legacies, and charges are to be paid, and that the residue of the estate not expended for these purposes is to be divided²⁴. When bequests read, "First, All my real and personal estate of any nature and kind whatsoever, and wheresoever situated I give, devise and bequeath unto my beloved wife, I. MacD., in the hope that she will manage and control the same to the best of her judgment and ability, during her widowhood, for the benefit of my children, J. S. and W. J. MacD. And, in the event of my said wife marrying again, my will is that she shall take nothing by this will after she so again marries, but that the residue of my real estate and personal estate, or any real or personal estate acquired by her through or by the above bequest, be sold or otherwise disposed of, and the proceeds or profits arising thereout be applied by W. H., one of my executors hereinafter

22. *Thurber v. Battey*, 105 Mich. 718, 63 N. W. 995.

104 Mich. 1, 61 N. W. 882.

24. *Dean v. Mumford*, 102

23. *Roehm v. Estate of Clark*, Mich. 510, 61 N. W. 71.

named, for the use and benefit of my children before named when they each, or the survivor, attain the age of 21 years.

"And I enjoin upon my said wife the maintenance, education, and support of my said children," it is manifest that she possessed the right, under the will, to encroach upon the principal, in case the income from the estate was not sufficient²⁵. The testatrix devises her estate to her son and five grandchildren so that one-third goes to the son and two-thirds to the grandchildren. The court so construed this devise as giving to each grandchild one-fifth of the two-thirds²⁶. The intention of the testator was to pass the insurance, held by him in the benefit association, although technically speaking, he may not have died seized of the same, by his will to the legatee named therein²⁷. Under a will bequeathing to executors a sufficient sum of money to be invested by them in the best government bonds to the amount of \$75000, they are required to invest in such bonds a sum sufficient to secure \$75,000 principal²⁸. Where a bequest in a testator's will was that all the personal property "belonging to or used in connection with" his farm and being thereon at the time of his death, to be used by his widow until his youngest son came of age, it being his intention to keep it in their hands until all should die, the bequest is construed that the proceeds of wheat that was in his barn when he died belonged to his residuary legatees²⁹. It is decided that the entire estate, both real and personal, is disposed where a will gives to the testator's

25. *MacDonald v. Hanna*, 100 Mich. 412, 59 N. W. 171.

26. *Wells v. Hutton*, 77 Mich. 129, 43 N. W. 768.

27. *Aveling v. Masonic Aid*

Association, 72 Mich. 7, 1 L. R. A. 528; 40 N. W. 28.

28. *Wisner v. Kleinhans*, 69 Mich. 307, 37 N. W. 270.

29. *Kempf's Appeal*, 53 Mich. 352, 19 N. W. 31.

wife all the real estate, lands, tenements, etc., together with all his chattels, personal moneys, credits, etc., that shall remain after discharging his legal debts, to have and to hold the same in sole possession and to enjoy the sole use and benefit thereof during the term of the legatee's natural life, provided, that any heir afterward born shall receive out of such property or out of its proceeds or annual income all needful and proper support, maintenance and education during minority, and shall at age receive half the property, or the whole, if the legatee named be dead³⁰. Where a man after deeding some land to one of his sons in consideration of the latter's relinquishing all claims of inheritance, made a bequest in which his wife and another son were the only legatees specifically named and where he provided that his wife should have the use of \$7000 until this son became of age, when the son was to have \$2000 of it and when the mother died the remaining \$5000 was to revert to the estate and the son was to share in it "*with the rest of my heirs*," this clause practically revoked the former arrangement by which the other son was excluded from any right of inheritance, and entitled him not only to a share in the \$5000 but in any surplus for distribution³¹. Again where a testator in a will made a bequest, after providing for the payment of testator's debts and the distribution of his estate, as follows: "And to N. N. E., I want him to have the farm I lately bought of B. C. at the same price and on the same terms, except he is not to pay any interest on the mortgage on the said farm after my death; and if the said farm amounts to more than his share the

30. *Chambers v. Shaw*, 52 Mich. 18, 17 N. W. 223.

31. *Turner's Appeal*, 52 Mich. 398, 18 N. W. 123.

balance to be paid equally to the rest of my children, except J.," it is decided that the farm was to be valued at the purchase price, from which N.'s share was to be deducted, and that he was to pay to the other devisees the amount annually due on the purchase price, and secure such payment by a mortgage on the farm, but that he was released from paying interest on his mortgage³². It is apparent that after the death of the testator's wife whatever remained passed immediately to the children and not to the wife's administrator, where a man devised certain lands to his wife and another provision of his will devised the same lands to his children after the decease of the wife, while another clause devised them to his wife "during her natural life" and then in his residuary disposition he had the clause "all the residue of my estate, real, personal and mixed * * * to have and to hold the same to her use and benefit, during her natural life, and then to be divided equally between his children or their heirs³³. A declaration in a will that all the foregoing legacies are intended and declared to be for the individual estate of the said legatees, exclusive of any indebtedness to me at this date or others," is decided not to release legatees from any indebtedness due from them to the testator, but is construed to mean that their legacies should be paid them irrespective of their debts which might be left to be collected in the ordinary way³⁴. Where a will disposed of a realty after the decease of testator's wife, but made no express directions concerning its disposal during her life, it is decided that to that extent it is an intestacy, it would during that period pass to the person or persons

32. *Enders v. Enders*, 49 Mich. 182, 13 N. W. 507.

Mich. 131, 12 N. W. 883.

33. *Ireland v. Parmenter*, 48

34. *Baldwin v. Sheldon*, 48 Mich. 580, 12 N. W. 872.

entitled to hold it in case there had been no will; and as the widow—there being no descendants—was entitled to possession, during life, of intestate's lands, the life estate belonging to her³⁵. In a will where a wife devised to her husband the undivided half of certain described lands, referred to as "containing 240 acres," and she made the devise subject to a right reserved by her grantor to occupy one-half of the dwelling-house thereon, and the other undivided one-half she devised to her children, while the descriptions were according to the government sub-divisions, but embraced only 140 acres, which was only part of the 240 acres actually granted to her in one compact body, and no other disposition was made of this grant, it was decided that the testatrix's intent was to devise the entire 240 acres³⁶. A devise by a testator of all his property to his wife, who was to pay his debts, followed by the clause that "the half of the residue after her decease to be paid to my sisters in Scotland share and share alike, if either should die before my wife's death, then the other to have the full half; if both should be dead, then let it be divided between their nearest heirs; the other half to be disposed of as my wife may direct," is given the construction that the widow took the entire estate; and that the testator contemplated that if she sold it and did not use all the proceeds during her life, one-half of the residue should be paid to the sisters or their heirs, and the other should be disposed of as the widow shall direct³⁷. Where a man devised certain real estate to two nephews, to be sold when they

35. *Langrick v. Gospel*, 48 Mich. 185, 12 N. W. 38.

36. *Waldron v. Waldron*, 45 Mich. 350, 7 N. W. 894.

37. *Weir v. Michigan Stove Company*, 44 Mich. 506, 7 N. W. 48.

became of age, and the proceeds to be equally divided between them, but also at the same time made provision that his wife was to have control of the property until they became of age, the devise was construed to give the wife in the meantime the exclusive and beneficial right of enjoyment³⁸. In a will the testator devised to one of his daughters the south $\frac{3}{4}$ of the south $\frac{1}{2}$ of the south $\frac{1}{2}$ of a specified quarter section, and more particularly described as containing 15 acres, being 15 rods wide by 160 long, and by a similar devise to another daughter a same quantity and by another similar devise to another daughter a strip of land $12\frac{1}{2}$ rods wide containing $12\frac{1}{2}$ acres, while the residue was to go to the remaining three daughters who were to share and share alike, but the actual quantity in each of the first devises, according to the first descriptions would be 30 acres, thereby leaving nothing for the residuary devisees, it is decided that these devises only cover 15 acres³⁹. Where a testator provided for the disposition of a certain bequest to his wife declaring "in case of her death *before his estate was settled*," the court construed the settlement to mean that stage of proceedings when the funeral expenses, debts and legacies had been paid and nothing remained but to divide the residue⁴⁰. Where a testator commenced his will with the following bequest: "To my wife the provision made for by the statute of this state I deem sufficient" and after providing sundry legacies to others he added a clause giving to his son "all the residue of my estate after paying the above bequests, legacies and my debts and the expenses of settling my estate," the court

38. *Hogan v. Hogan*, 44 Mich. 147, 6 N. W. 206.

Mich. 100, 6 N. W. 218.

39. *Tewksbury v. French*, 44

40. *Calkins v. Smith's Estate*, 41 Mich. 409.

construed this bequest to mean that he gave his wife what she would have received if he had died intestate⁴¹. In a will a man bequeathed to his wife his house and all his personal property "to her sole use forever," and farther he provided that she should have the *use of* all the moneys during her natural life; that after her death a specified legatee should have \$500 out of any money that she might have at her death; and finally that the residue of the money and a mortgage, which was agreed should be considered money, should be divided among certain other legatees, the court decided that the widow was entitled to the possession and management of the fund represented by the mortgage and the word "use" does not mean interest, but enjoyment⁴². Where a will required the executors to put up a building on certain land, and provided that, "should it become necessary to sell real estate for the purpose of building," they might sell certain other specified premises and where the lot and buildings were to go to the testator's grandson, and in the event the latter died under eighteen, "all the real estate" was to go to the testator's brother, but the grandson dies at the age of fifteen, and his administrator claimed a quantity of personalty, not specifically bequeathed by the will, as belonging to the estate of his intestate as his grandfather's sole heir at law, the court decided that the will evidently intended that the residuum of personalty was to be used in building the stores, and that it therefore went with the lot on which they were to be put up, to the testator's brother⁴³. A clause in a will giving testator's wife so much of his property, real and

41. Kelly v. Reynolds, 39 Mich. Mich. 402.

464.

43. Allen v. Stead, 38 Mich.

42. Patterson v. Steward, 38 756.

personal, as is allowed by law to widows in cases where no will is made, or in lieu of personal property allowed her by law, \$500 to be taken by her in case she so elect in lieu of said personal property, is construed to mean that the "personal property allowed by law," to which the sum of \$500 is made an alternative, refers to the specific property to the value of \$450 which by law the widow is allowed to select⁴⁴.

§136. Cumulative and Substitutional Legacies.

Cumulative and substitutional legacies are such legacies, made by will or by will and codicil or codicils to the same person or persons in that the two gifts are made so that the intention of the testator in the second legacy was to make it either additional or to be given in place of the first, i. e., cumulative or substitutional. Thus, where two legacies are bestowed, one in a will and the other in a codicil, the latter was declared substitutional under the evidence^{44a}.

§137. Ademption. Advancement.

A disposition may fail because it is adeemed or lapsed. An ademption takes place where a testator bequeaths to another a sum of money, and previous to his death, he pays to such person the same amount as he bequeathed, upon the express understanding that it was to discharge the bequest. In such case the legacy is said to be adeemed. The general rule is that the intention must be expressed or apparent that the testator pays the money in discharge of the bequest, but to this rule there is an exception, where the testator is a par-

44. *Kinney v. Kinney*, 34 Mich. 250.

44a. *Sondheim v. Fechenbach*, 137 Mich. 384, 100 N. W. 586.

ent of or stands to the legatee *in loco parentis*. In such case the payment would be presumed to be an ademption of the legacy, i. e., a presumption arises that the testator (a parent) intended to adeem or revoke, in whole or *pro tanto*, that which he had given by legacy to a child by making payment of money or property after the bequest, and during his life time, to this legatee. The object of this rule is to procure an equality among the heirs. But one of the limitations placed upon this rule is that the presumption can not be applied to a residuary bequest, because the courts will not presume that legacy of a residue, or other indefinite amount, had been satisfied by an advancement, as the testator might be ignorant whether the benefit that he was conferring equaled that which he had already willed, and another limitation was that the doctrine of an ademption could not apply unless the advancement was *ejusdem generis* with the legacy, but where it clearly appears that the intention of the testator was to adeem *pro tanto* a residuary bequest previously made by a conveyance of real estate to the child, the ademption was declared valid⁴⁵.

§138. Lapsed and Void Legacies. Survivorship. Substitution.

Lapsed legacies are such that fail when the beneficiary dies in the lifetime of the testator, or before the gift vests. The rule relating to lapsed devises and legacies, that prevailed before the statute, defeated, in most cases, the intentions of the testator. In general he made his will with reference to the objects of his bounty as they existed at

⁴⁵. *Carmichael v. Lathrop*, 108 W. 350.
Mich. 473, 32 L. R. A. 232, 66 N.

the time, and as though his will took effect at the date of its execution, not apprehending that a lapse would occur in case any of them should die before himself, unless some express disposition should be made in anticipation of such event. The statute was passed to remedy such disappointment, and should receive a liberal construction, so as to advance the remedy and suppress the mischief. The common law rule as to gifts to classes in general was that the children and the descendants of such deceased members could not take in place of their ancestor. This rule has been modified by statute⁴⁶ which provides that when a devise or legacy shall be made to any child or other children or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will, in the same manner as the devisee or legatee would have done, if he had survived the testator, unless a different disposition shall be made or directed by the will. In regard to lapsed legacies the law has always treated them as part of the general body of the estate, so that they pass to the residuary legatees. A lapsed legacy is in law no legacy, for residuary purposes. The statute⁴⁷ applies in case where a will devised real estate in equal shares to the brothers and sisters and to those of the wife without naming them⁴⁸. Legacies are not saved by the statute from lapsing where the legatee dies before the testator⁴⁹. Where in contemplation of marriage a woman deeds her property to her intended husband and thereupon he executes a will devising it to her, and they intermarry

46. C. L. '97. §9288.

567, 48 N. W. 183.

47. C. L. '97. §9288.

49. Mann v. Hyde, 71 Mich.

48. Strong v. Smith, 84 Mich.

278, 39 N. W. 78.

subsequently, the inference is that they intended that the survivor should have the property. There is no devise over in the event of her death, and no declaration by the testator that the devise should not lapse. In such case, the property devised descends to the heirs or residuary legatees of the testator⁵⁰. It is established that the estate vests at the death of the testator where there is no provision in the will to the contrary and for that reason the legacy does not lapse by death of the legatee before probate of the will⁵¹. Legacies that are void because of some positive rule of law are such as are against the rules of perpetuities⁵². The rules concerning the devolution of void estates are the same as those relating to lapsed legacies. The property descends the same as if the testator died intestate where no residuary provision is made in the will. Where a statute^{52a} declares void all beneficial devices, legacies and gifts whatsoever made or given in any will to a subscribing witness, unless there be two other competent, subscribing witnesses to the same, the legatee under the void legacy is competent as a witness^{52b}.

The common law rule is that the personal estate is the primary source from which the payment of legacies is made, unless the intention of the testator can be otherwise clearly

50. *Williams v. Circuit Judge*, 79 Mich. 539. See *Hibler v. Hibler*, 104 Mich. 274.

51. *Jersey v. Jersey*, 146 Mich. 660, 110 N. W. 54.

52. *State v. Holmes*, 115 Mich. 456, 73 N. W. 548.

52a. C. L. 97, §9268. All beneficial devises, legacies and gifts whatsoever, made or given in any will to a subscribing witness thereto shall be wholly void, unless there be two other competent

subscribing witnesses to the same; but a mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to this will.

52b. *Rue High's appeal*, 2 Doug. 529; *Finegan v. Theisen*, 92 Mich. 178. See *Abrey v. Duffield*, 149 Mich. 249; *Frazer v. Jennison*, 42 Mich. 206, *Lawyer v. Smith*, 8 Mich. 424.

gathered from the will. Where a testator gave to his wife the use for her life of all his real and personal estate, and directed that a certain legacy, given to one of his sons as the sum which the testator considered equitable, due this son for services rendered, should be paid out of the personal estate on hand at the time of the death of the wife, but the personal property was insufficient to pay the legacy, the court decided that the legacy was not a charge upon the real estate of the testator, which he specifically devised to the legatee and another son subject to the payment of other legacies⁵³. In this case the charges were specific, one of the charges was specifically upon personal property, while the others were a charge upon real estate. In a case where a testatrix devised and bequeathed all of her "real estate, personal property, and household effects," to a nephew, subject to the provision that he pay certain legacies, and upon his death the real estate should pass to others, the will was construed to mean that the real estate as well as the personal property was charged with the payment of the legacies⁵⁴. A legacy can be a charge upon real estate by necessary implication⁵⁵. Specific legacies and specific devises are not chargeable with the payment of demonstrative or general legacies unless made so expressly or by clear implication⁵⁶.

Where land was devised to the husband, it was subject to the legacy of the son⁵⁷. The legacies in a will devising

53. *Hibler v. Hibler*, 104 Mich. 274, 62 N. W. 361.

54. *Chase v. Warner*, 106 Mich. 695, 64 N. W. 730.

55. *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228.

56. *Hibler v. Hibler*, 104 Mich.

274, 62 N. W. 361.

57. *In re Appeal of Moore*, 84 Mich. 474, 48 N. W. 39. Other cases are: *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111; *Enders v. Enders*, 49 Mich. 182, 13 N. W. 507; *De Coo v. Woodworth*, 96 Mich. 302, 55 N. W. 987.

and bequeathing all the real estate, mortgages, notes and other securities to her daughter, with the understanding that she shall pay certain legacies out of her portion of the real estate, were general charges upon the entire estate⁵⁸.

§140. Liabilities on Devises and Bequests.

The statutes⁵⁹ declaring that all of the property of a testator shall be chargeable with the payment of all of his debts, and creating an equitable lien in favor of creditors, are valid⁶⁰. The effect of the statute is not destroyed by the execution of the statutory bond by a residuary legatee, which becomes an additional security for such payment⁶¹. The debts were to be paid out of the real as well as personal estate, where the intention of the testator was manifest by giving direction to pay debts, followed by a residuary clause disposing of all his property, both real and personal⁶². Under statute⁶³, a decree for contribution by devisees and

58. *In re Owen's Estate*, 138 Mich. 293, 101 N. W. 525.

59. C. L. 297, §9259. All the estate of the testator, real or personal, shall be liable to be disposed of for the payment of his debts, and the expenses of administering his estate, and the probate court may make such reasonable allowance as may be judged necessary for the expenses of the maintenance of the widow and minor children, or either, constituting the family of the testator, out of his personal estate, or the income of his real estate, during the progress of the settlement of the estate, but never for a longer period than until their shares in the estate shall be assigned to them.

60. *Lafferty v. People's Sav. Bank*, 76 Mich. 51; *Burns v. Berry*, 42 Mich. 176; *Winegar v. Newland*, 44 Mich. 367; *Pierce v. Holzer*, 65 Mich. 263; *Hoffman v. Beard*, 32 Mich. 218. See *In re Corby's Estate*, 154 Mich. 352; *Hill v. Judge*, 128 Mich. 77. As to all the estate being liable, see *Allison v. Smith*, 16 Mich. 426. As to allowance to widows, see *Bacon v. Judge*, 100 Mich. 183; *Pulling v. Judge*, 88 Mich. 339; *Pulling v. Judge*, 85 Mich. 34; *North v. Judge*, 84 Mich. 69.

61. *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 43 N. W. 34.

62. *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 43 N. W. 34.

63. C. L. '97, §9296. The probate court may, by decree for that

legatees in payment of debts and other liabilities of the estate is nothing more than a personal judgment⁶⁴. Liens and encumbrances on lands are charges against the estate⁶⁵.

purpose, settle the amount of the several liabilities, as provided in the preceding sections, and decree how much, and in what manner, each person shall contribute, and may issue execution as circumstances may require; and the claimant may also have a remedy in any proper action or complaint in law or equity.

64. *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560, 41 N. W. 96.

65. *Enders v. Enders*, 49 Mich. 182, 13 N. W. 507. See *Lawrence v. Hathaway*, 128 Mich. 118, 87 N. W. 84. As to apportionment of debts, see *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560, 41 N. W. 96.

CHAPTER IX.

THE NATURE OF THE ESTATE CREATED.

- §141. General Rule of Inheritance.
- §142. Words Necessary to Create Estates in Fee.
- §143. Words Necessary to Create Life Estates.
- §144. Life Estate Created with a Disposition Over.
- §145. Life Estates in Relation to Direction to Support.
- §146. Estate in Fee, Limitations, Repugnant and Inconsistent Provisions.
- §147. Estate for Life, Limitations, Repugnant and Inconsistent Provisions.
- §148. Statutory Provisions by Which Estates-tail Are Converted Into Other Estates.
- §149. The Rule in Shelley's Case.
- §150. Remainders.
- §151. Executory Devise and Contingent Remainder.
- §152. A Conditional Fee.
- §153. Estate Created by Use of the Words, "Dying Without Issue."
- §154. Estate in Severalty.
- §155. Estate in Fee. Devise with Power of Disposition.
- §156. Estate for Life with Power of Control or Disposition.
- §157. Estates Created in Personal Property.
- §158. Annuities and Incomes.
- §159. The Enforceability of a Gift of Income Charged with Support.
- §160. The Income Passes to Whom.
- §161. Duration of Annuities.

§141. General Rule of Inheritance.

The general rule of inheritance was that the heir could be disinherited only by words which disposed of the entire estate of the testator. Although this rule does not obtain absolutely in its application, yet it is manifest that the law favors that construction of a will which will make a distribution as nearly conformable to the general rule of inheritance as the language will permit¹, for it is a maxim

1. *Rivenett v. Bourquin*, 53 Mich. 10, 18 N. W. 537.

that an heir at law can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed². It is apparent then that heirs at law are not to be disinherited by conjecture, but only by express words or by necessary implication³. Equities rather than technicalities will be carried out and performed⁴. In general it may be said that it is the substance rather than the form which must be considered in the construction of a will⁵. All intendments must favor the will as against a partial intestacy⁶. It is apparent then under this rule that where the will does not naturally lead to the inference that a testator means to die intestate as to a part of his estate no such presumption will arise⁷. Courts cannot inquire into the propriety of any disposition which the testator sees fit to make but are bound to carry out his expressed wishes, so far as they are not unlawful in the substance and spirit of the words creating the devises and bequests⁸.

§142. Words Necessary to Create Estates in Fee.

The principle is well established that wills are more liberally construed than deeds, and that the technical word "heirs" is not absolutely necessary to pass a fee⁹. Although the general use of the term "heir" naturally gives rise to

2. *Southgate v. Karp*, 154 Mich. 697.

3. *Southgate v. Karp*, 154 Mich. 697.

4. *Rivenett v. Bourquin*, 53 Mich. 10, 18 N. W. 537.

5. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

6. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

7. *Bailey v. Bailey*, 25 Mich. 185.

8. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

9. *Mullreed v. Clark*, 110 N. W. Mich. 229; *Goodell v. Hibbard*, 25 Mich. 185.

the creation of an estate of inheritance¹⁰, yet it may often have the meaning of "children" or "issue"¹¹. Where a testator devised and bequeathed all his property, both real and personal, to his wife in the following words: "For and during her natural life, to do and dispose of the same as fully as I might do were I alive," they create an estate in fee¹². It is manifest that by implication under the statute¹³ an estate is created where the testator in his first clause devised an estate in fee, without words of limitation, and the other clauses burdened the estate so devised with a trust in favor of testator's children, the devisee does not take a life estate, but the fee, subject to the trust imposed on the estate devised, and the devisee may convey, subject, however, to the burden imposed upon the estate¹⁴.

An estate tail general is one limited to a man and the heirs of his body without any further specification, and where a devise in a will has the clause, "not only to the devisee but to the heirs of his body" such clause creates under the law¹⁵ a fee, instead of an estate tail general as by common law¹⁶.

10. *Bailey v. Bailey*, 25 Mich. 185.

11. *Goodell v. Hibbard*, 32 Mich. 47.

12. *Dills v. La Tour*, 136 Mich. 243, 98 N. W. 1004, following *Jones v. Jones*, 25 Mich. 401.

13. C. L. '97, §9263. Every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate.

14. *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385.

15. C. L. '97, §8785. All estates tail are abolished and every estate which would be adjudged a fee tail, according to the law of the territory of Michigan, as it existed before the second day of March, one thousand eight hundred and twenty-one, shall for all purposes be adjudged a fee simple; and if no valid remainder be limited thereon, shall be a fee simple absolute.

16. *Rhodes v. Bouldry*, 138 Mich. 144, 101 N. W. 206.

§143. Words Necessary to Create Life Estates.

The modern doctrine is that where no contrary intention appears in the will, a devise is *prima facie* a devise of the entire interest of the testator in the property devised¹⁷, for the cardinal principle of interpretation of wills is to carry out the intention of the testator, if it is lawful and can be discovered¹⁸. The words contained in a will, "to have and to hold the same (real estate) as long as she remains my widow, but if she shall marry again, I request and direct that she sell said lot and divide the proceeds between herself and my sons," create a life estate¹⁹. Where a testator gave to his wife in these words his property, to his executors "for the purpose" hereinafter mentioned, viz: "I desire that my wife shall have the full use, benefit and enjoyment of all my property * * * during * * * her natural life," an estate for life is created²⁰. Again where a testator gave the bulk of his estate, both real and personal, to his wife upon the following terms: "to use as she shall see fit, or so much of the same as she shall need for her support, comfort and maintenance" during her life time, the residue after her death to be divided equally among three persons, "or their legal heirs or representatives, in case either should die before final settlement," creates a life estate²¹. A will conveyed a life estate where a husband devised certain real estate to his wife, to be used

17. Robinson v. Finch, 116 Mich. 180, 74 N. W. 472.

18. Jones v. Deming, 91 Mich. 48, 51 N. W. 1119; Cousino v. Cousino, 86 Mich. 323, 48 N. W. 1084; Schehr v. Look, 84 Mich. 263, 47 N. W. 445; Glover v. Reid, 80 Mich. 228, 45 N. W.

91; Eyer v. Beck, 70 Mich. 184, 38 N. W. 20; Bailey v. Bailey, 25 Mich. 185.

19. Peck v. Griffis, 148 Mich. 682, 112 N. W. 722.

20. Burns v. Burns, 132 Mich. 441, 93 N. W. 1077.

21. Brendel v. Hansen, 127 Mich. 396, 86 N. W. 951.

by her as a homestead, or for her benefit if rented, so long as she should live, and the will also charged upon the payment to the sister of the testator of one-half the rental value, and authorized the wife at her option, to sell the real estate, and divide the proceeds equally between herself and his sister²². The words, "during her natural life * * * the possession, exclusive use, control, and management" create a life estate²³. Where a will devising certain real and personal estate in trust for the grandson of the testator, with directions to the trustee to manage, direct and control such land until the grandchild should arrive at the age of 21 years, and to appropriate no more of the income from the trust estate for the support and maintenance of such grandson than should be made necessary by accident or misfortune (the grandson having a father living), and providing that, in case of death of the grandson without heirs by his body begotten, such land and property, with all its increase or accretion should pass to the children of the testator, their heirs and assigns, the bequest does not limit the contingency of death without issue to the minority of the grandson, but creates a life estate only in him upon attaining his majority²⁴. No greater estate than a life estate can be created by these words, "during her natural life-time, and after her death to her heirs and assigns forever; * * * to have and to hold * * * during her natural life, and afterwards to her heirs and assigns forever." A life estate is created by the words, "during her natural life"²⁵. And where the

22. *Anderson v. Ettridge*, Mich. 237, 70 N. W. 545.
125 Mich. 464, 84 N. W. 613.

23. *Austin v. Hyndman*, 119 Mich. 615, 78 N. W. 663.

24. *Eldred v. Shaw*, 112

25. *Gaukler v. Moran*, 66 Mich. 353, 33 N. W. 513. See *Chambers v. Shaw*, 52 Mich. 18, 17 N. W. 223.

residue was disposed of by the words, "to have and to hold the same, both real, personal and mixed, to her own use and benefit, during her natural life," and then to be divided equally between his children or their heirs²⁶.

§144. Life Estate Created with a Disposition Over.

It is manifest that a life estate may be created by a disposition to the first taker with a remainder over to other takers after his death; provided the will does not clearly dispose of a fee in the first taker²⁷.

§145. Life Estates in Relation to Direction to Support.

Where a will is construed to vest the title to the lands devised in the children of the father for whom the testator makes a provision that the father's living and support is to come out of the estate of the children, it is construed by the court that this provision does not create a life estate therein²⁸. In this case²⁹ the court said: "We think the probable intent of the testator was that during his life the plaintiff should work, care for, and manage this farm, having his living and support out of it, one-third of the profits, if any, to go to the widow, and the balance of the profits to the children. If he had intended to give a life-estate to the plaintiff he would undoubtedly have said so. He meant, however, it appears to me, that, if anything was realized out of the farm over and above the living and support of plaintiff, it should belong to the children."

26. Ireland v. Parmenter, 48 Mich. 631. 12 N. W. 883.

27. Eldred v. Shaw, 112 Mich. 237, 70 N. W. 545.

28. Rose v. Eaton, 77 Mich.

247, 43 N. W. 972. See Barnes v. Marshall, 102 Mich. 248, 60 N. W. 468.

29. Rose v. Eaton, 77 Mich. 247, 43 N. W. 972.

§146. Estates in Fee, Limitations, Repugnant and Inconsistent Provisions.

It may be stated as a general rule that the latter part of a will is to be considered no less than the former part, and, to the extent that if there is repugnance, the language of the former part is to be read as modified by that of the latter part³⁰. Thus the devise or bequest which, standing alone, would give an absolute estate in fee may be modified by a subsequent clause by an intentional limitation³¹. A will, devising an estate in fee containing a subsequent clause giving directions as to what disposition shall be made of the residue left over at the death of the devisee, is repugnant to the fee and therefore void³². But where a testator gave and bequeathed to his wife his homestead consisting of 30 acres in the southeast corner of section 5, and under a subsequent clause he gave and devised all his lands in sections 2 and 4 to one of his sons, "reserving the right of my widow to occupy the homestead during her natural life," and where the testator did not possess any homestead or 30 acres in section 5, but did so in section 2, an estate for life was only devised to the widow, with a remainder to her son³³. A will containing the clause, "I give and bequeath to my beloved wife all my property, real and personal, of every name, nature and description to be hers absolutely," which was followed by the repugnant clause, "providing, however, that if at her death any of the said property be still hers, then said residue still hers

30. Robinson v. Finch, 116 Mich. 180, 74 N. W. 472; Gadd v. Stoner, 113 Mich. 689, 71 N. W. 1111. Barnes v. Marshall, 102 Mich. 248, 60 N. W. 468.

31. Robinson v. Finch, 116

Mich. 180, 74 N. W. 472.

32. Killefer v. Bassett, 146 Mich. 1; 109 N. W. 21.

33. Thorn v. Scofield, 143 Mich. 473, 107 N. W. 100.

shall go to my, not her, nearest heir or heirs," creates an absolute estate³⁴. It is manifest that where a testator devised to his wife lands which, after her demise were to pass to his son, and after his decease to his son, the son took a life estate with a remainder to his heirs³⁵. Where a will by which the testator, after providing for the payment of his debts, bequeaths the residue of his estate to his wife, "and after her death, or sooner, if she chooses to, to be divided among his children or their heirs, share and share alike," a life estate was conveyed to the widow³⁶. It is construed that a devise of the proceeds of lands when sold, which is absolute and exclusive, with no provisions whereby any other person should in any event have any right or interest therein, and subject only to a life estate in the widow of the devisor, is in effect a devise of the remainder in fee³⁷.

§147. Estate for Life, Limitations, Repugnant and Inconsistent Provisions.

Limitations of life estates may be variously effected. Where a testator devised all of his real estate to his wife, to remain to her use and benefit during her widowhood, and at her decease to his and her daughter, to be and to remain to her use and benefit, and where under which instrument the widow entered into possession and after the death of her daughter, who died unmarried and without issue, she conveyed by warranty deed the land, claiming title as such widow, and as mother and sole heir

34. *Moran v. Moran*, 143 Mich. 322, 106 N. W. 206.

35. *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L.

R. A. 744, 63 Am. St. Rep. 584.

36. *Cousino v. Cousino*, 86 Mich. 323, 48 N. W. 1084.

37. *Mandelbaum v. MacDonnell*, 29 Mich. 78, 18 Am. Rep. 61.

of the daughter, the court decided that the daughter took an expectant estate, descendible in the same manner as one in possession³⁸. No other or greater estate will be created where a testator devised to his daughter certain real estate "during her natural life time, and after her death to her heirs and assigns, forever;" to have and to hold the same to her during her natural life, and afterwards to her heirs and assigns, forever³⁹.

§148. Statutory Provisions by Which Estates-tail Are Converted Into Other Estates.

Estates-tail have been abolished by statute⁴⁰. Thus where a devise of land was made to one and the "heirs of his body" an estate in fee simple passed⁴¹. A devise which is construed as designed to grant to the sister named what at common law would be an estate tail, with remainder over to the minor children named in the event of her dying without issue of her body, under the statute⁴², though estates tail are abolished, would be a valid remainder as a contingent limitation upon a fee, and could vest in possession on the death of the first taker, without issue living at the time of such death⁴³. Under a will containing the following devise: "I give and bequeath to my beloved son, the farm I now reside on, for and during his life-time, with all the appurtenances thereon; and after his decease, then the rights, title and appurtenances of the aforesaid farm are

38. *Curtis v. Fowler*, 66 Mich. 696, 33 N. W. 804. See C. L. '97 §8817. Expectant estates are descendible, devisable, alienable, in the same manner as estates in possession.

39. *Gaukler v. Moran*, 66 Mich. 353, 33 N. W. 513.

40. C. L. '97, §8785. See note 15.

41. *Rhodes v. Bouldrey*, 138 Mich. 144, 101 N. W. 206.

42. See note 38.

43. *Goodell v. Hibbard*, 32 Mich. 47.

to become the property of the said son's male heirs," the son took an estate tail which was changed by statute⁴⁴ into a fee simple⁴⁵.

§149. The Rule in Shelley's Case.

The rule may be stated that an estate, when limited to one for life, and by the same document the inheritance is limited, either immediately or after another estate in feehold, to his heirs or the heirs of his body, vests in him, either in fee simple or in fee tail, in the same manner as if the estate had been given to him and his heirs, or to him and the heirs of his body; and the words "heir" and "heirs of his body" are words of limitation and not of purchase. This ancient common law rule may be said to be in accord with modern jurisprudence, for the reason that it "laid in a principle diametrically opposite to the genius of feudal institutions, namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor," but the rule has been abolished by statute.

The statute provides that when a remainder shall be limited to the heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them⁴⁶.

§150. Remainders.

It may be said that there is no particular form of words

44. See note 38.

81.

45. *Fraser v. Chene*, 2 Mich.

46. C. L. '97, §8810; *Fraser v.*

required in a will to create a remainder. A remainder is created and treated when a future estate is dependent upon a precedent estate⁴⁷. Where a testator disposed of a homestead in a certain section of land with a certain number of acres, without having possessed a homestead nor land in this section, and where he bequeathed to his son land in different sections in one of which the homestead stood, with the reservation, "reserving the right of my widow to occupy the homestead during her natural life," a life estate was created in the wife with a remainder to the son⁴⁸. An estate in remainder vested in the residuary legatees where the bulk of the estate of the testator, consisting of real and personal property, was given to the wife "to use as she shall see fit or so much of the same as she shall need for her support, comfort and maintenance" during her lifetime, while the residue is to be equally divided among three persons or "their legal heirs or representatives in case either should die before final settlement," after her death⁴⁹. A devise, giving certain land to the widow of the testator with the provision that "after her decease the said real estate above described I give and bequeath to * * my son, and after his decease said real estate to belong to his heirs," grants a life estate to the son, with remainder to his heirs⁵⁰. Again, a devise of the proceeds of lands when sold, which is absolute and exclusive with no provision whereby any other person should in any event have any right or interest therein, and subject only to a

Chene, 2 Mich. 81.

47. C. L. '97, §8793. When a future estate is dependent upon a precedent estate, it may be termed a "remainder," and may be created and transferred by that name.

48. *Thorn v. Scofield*, 143 Mich. 473, 107 N. W. 100.

49. *In re Mallary's Estate*, 127 Mich. 119, 86 N. W. 541.

50. *Defreese v. Lake*, 109 Mich. 415, 67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584.

life estate in the widow of the devisor, is a devise of the remainder in fee⁵¹.

§151. Executory Devise and Contingent Remainder.

An executory devise is such a limitation of a future estate in lands or chattels (though in the case of chattels personal, it is more properly an executory bequest) as the law admits in the case of a will, though contrary to the rules of limitations in conveyances at common law. The fact of an executory devise being contrary to the rules of limitation in conveyances at common law, gives rise to two rules universally adopted in respect to executory devises in that whenever a future interest is so limited by devise as to fall within the rules laid down for the limitation of contingent remainders, or the estate limited by it is such as can take effect as a contingent remainder, it shall never take effect as an executory devise. Thus an executory devise directing limitations beyond the period allowed by law is void for the whole and not merely for the excess beyond the legal period⁵²; so where a testator provided in his will that each disposal of real estate made by it should only be for the use and benefit of the persons in whose favor it was made, his or her *life lasting*; that no parcel of the real estate should be sold or alienated in any manner, but after the decease of those several persons to whom shares or parcels of the estate were assigned, said shares should remain for the use and benefit of the descendants of him or her to whom a share had been assigned, *their lives lasting, and so on*, and in case of demise without

51. *Mandelbaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61.

52. *St. Amour v. Rivard*, 2 Mich. 294.

posterity, the said share should accrue to the use and benefit of the owners being of the testator's relation or descendants, *their lives lasting*, of the next share or shares, and so on, as long as any posterity should exist, and in case of extinction, to the next heirs, the devise is deemed as against public policy and therefore void, for the reason that it created a succession of life estates, rendering the real estate inalienable⁵³. The institution of executory devises was founded on the reason that the will of the testator was to be supported; for where it was evident that he intended a contingent remainder, and when it could not operate as such by the rules of law, the limitation was then out of indulgence to wills held to be good as an executory devise⁵⁴.

§152. A Conditional Fee.

No conditional fee is created where a house and lot was devised to a church under the clause, "to be used as a parsonage and nothing else, and to be kept for that purpose and used for nothing else"⁵⁵.

§153. Estate Created by Use of the Words, "Dying Without Issue."

The rule is that the use of the words "dying without issue" after words which create an estate in fee, simply creates a fee conditional upon the existence of issue of the first taker at the time designated, which is usually the death of the first taker. Thus, under the statute which

53. *St. Amour v. Rivard*, 2 Mich. 294.

54. *Kent's Commentaries*, 263.

55. *Adams v. First Baptist*

Church of St. Charles, 148 Mich. 140, 11 L. R. A. (N. S.) 500, 111 N. W. 757.

reads: "When a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs,' or 'issue,' shall be construed to mean heirs or issue living at the death of the person named as ancestor." A devise to the wife of the testator during her life and after her death to a designated son, and, "if he should die without heirs," to two specified daughters, vests the fee in the son if living at the time of the death of the testator, subject, however, to be defeated if he dies without issue surviving him⁵⁶.

§154. Estate in Severalty.

A devise in which a testator devises his estate in trust, and by a single clause makes provision that one-half of the income shall be paid to his son, and one-half to his daughter for life creates an estate severalty⁵⁷.

§155. Estate in Fee. Devise with Power of Disposition.

Power is often given to those who have an interest in property, devised or bequeathed by the testator, to dispose of the same. It is apparent that this power has an effect upon the duration of the estate granted in the will. Where a testator devises an estate in fee, appearing clearly from the will, but in another clause burdens this estate with certain trusts whereby an attempt is made to direct the course of descent upon the death of the first taker, such clause is repugnant to the estate granted and therefore is of no effect⁵⁸. Where a devise reads, "I give and be-

56. C. L. '97, §8804; Mullreed v. Clark, 110 Mich. 229, 68 N. W. 989. See Goodell v. Hibbard, 32 Mich. 47.

57. Palms v. Palms, 68 Mich. 355, 36 N. W. 419.

58. Forbs v. Darling, 94 Mich. 621, 54 N. W. 385.

queath to my beloved wife, in money, \$3000, to be paid in accordance with the following provisions, to wit: I will and bequeath all the residue and remainder of my personal property, and all of my real estate, to my only child, C., for her sole use and benefit during her life, and at her death to her children: *Provided*, that the aforesaid payment of \$3000 be made to my wife, or the annual interest at the rate of 7 per cent, annually, as she, my wife, may elect, and, at any time when my wife may want any portion or the whole of said amount of \$3,000, it shall be paid to her on three months' notice, either verbal or written, or she may sell enough out of said real estate to pay said amount on the failure of my daughter to pay her after the aforesaid notice," this devise is construed that it was the intention of the testator to place the sum of \$3000 at the absolute disposal of the widow⁵⁹.

§156. Estate for Life with Power of Control or Disposition.

A power of disposal annexed to a devise may have effect upon the duration of the estate granted or devised. Thus, a devise to the wife of the testator of all of his property to be used "as she may desire and wish for and during the term of her natural life" does not defeat the estate in fee, where the intention is manifest that this power should only be exercised by the wife if required for her proper support⁶⁰. A life estate in the fund only vests in the wife, coupled with the right that she may use part of the principal as her demands may require, where the

59. *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228.

60. *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111.

bequest was that "the sum of \$2000, the interest on said sum, at the rate of 7 per cent. per annum, to be paid to her annually during the life, and in case the \$140 per year shall not be sufficient for her comfortable support and maintenance, or if, in case of sickness or feebleness of health, she shall need more than the interest on said sum, then she shall use so much of the principal as is necessary for her support and maintenance, and the payment of her needed medical attendance and funeral expenses." The interest of the wife is expressly limited to a life estate where a devise is "subject to the conditions that she is to receive the rents, profits, and benefits during her natural lifetime," with remainder, after her death, to a daughter⁶¹. It is manifest now that a devise of property for the devisee's natural life, with authority to dispose of enough for his support, if the use of it should be not sufficient, creates a life estate with conditional power of disposal⁶².

§157. Estates Created in Personal Property.

The rule at common law is that if there is nothing in the context of the will to show an intention to give anything less than an absolute ownership of personalty, the interest created and intended is that incident to an absolute ownership. It is manifest that where a life estate passes only by the gift of a life estate with full power

61. *Lyon v. Sweeny*, 91 Mich. 478, 51 N. W. 1106. In *McCarty v. Fish*, 87 Mich. 48, 49 N. W. 513, the husband only took a life interest, with the privilege of using the entire amount if necessary. In *Glover*

v. Reid, 80 Mich. 228, 45 N. W. 91, the wife took a life estate with the privilege of making such disposition of it as her needs required.

62. *Morford v. Diffenbacker*, 54 Mich. 593, 20 N. W. 600.

of disposition in a devise of realty a like disposition will be made in a bequest of personalty⁶³. Though it is questionable whether an absolute bequest to the wife of the testator of a specific mortgage to which is appended a further bequest, after her death, of the residue of the mortgage to a son, does not transfer an entire and absolute interest, instead of a life interest merely, or a partial or qualified one⁶⁴, yet it has been determined that the word "use" gives legatee absolute possession and control of mortgage⁶⁵.

§158. Annuities and Incomes.

The right of the testator to dispose of the income of his property by will, and by disposition of this kind, is recognized by law as long as the dispositions are not against the rules governing perpetuities. The beneficiary, under a will directing the payment of a specified sum yearly to a beneficiary for her support during the settlement of the estate, payments to be made in stated installments "until the estate is closed," is entitled to the allowance until the final settlement actually takes place, notwithstanding the estate is kept open after the time when such settlement might otherwise be made by the prosecution of a claim against such beneficiary⁶⁶. Payments under a will that the income shall be received by all beneficiaries clear of their debts and alienations and the "payments must be made either directly to the beneficiaries, or upon their respective orders, signed not more than three months before-

63. *Godshalk v. Akey*, 109 Mich. 350, 67 N. W. 336.

64. *Proctor v. Robinson*, 35 Mich. 285.

65. *Patterson v. Stewart*, 38 Mich. 402.

66. *In re Batchelor's Estate*, 119 Mich. 239, 77 N. W. 941.

hand," should be made to the guardian of an insane legatee⁶⁷.

§159. The Enforceability of a Gift of Income Charged with Support.

Where a will declared that the wife should keep and use the residue of the estate for the support and maintenance of herself and family, and the education of the children, and, for the better maintenance and education of the children, the testator committed to his wife their guardianship until of full age, during which time the expense of such maintenance and education were to be paid and borne by his wife out of the moneys and estate given and bequeathed to her, no accounting being provided for nor provision made as to the extent of the education, although the trust is enforceable yet if the support and education of the children were meagerly supplied, the court will not require a retrospective accounting⁶⁸.

§160. The Income Passes to Whom.

The income from accretions during the minority of a grandson under a will creating a life estate in him, with remainder in fee to his issue, if any, and, if not, to the children of the testator and their children, is payable to him during his life, and upon the death of the grandson, the income and principal pass to the same persons as the real estate⁶⁹. On the other hand, if the first tenant has

67. *State v. Dunbar's Estate*, Mich. 621, 54 N. W. 385.
99 Mich. 99, 57 N. W. 1103.

69. *Elared v. Shaw*, 112 Mich. 237, 70 N. W. 545.

not a life estate, but merely the use of it for his maintenance and support, the accumulation will pass either into the residuary clause, or be regarded as property not disposed of by will⁷⁰.

§161. Duration of Annuities.

It is manifest that full effect is given to the time specified in the will when the annuity is to be paid. Where annuities are to be paid until the estate of the testator is settled, the beneficiary is entitled to the allowance until the final settlement actually takes place⁷¹.

70. *Schehr v. Look*, 84 Mich. 263, 47 N. W. 445.

71. *In re Batchelor's Estate*, 119 Mich. 239, 77 N. W. 941.

CHAPTER X.

TESTAMENTARY TRUSTS AND POWERS.

- §162. Trusts—Testamentary—Elements.
- §163. Words Sufficient to Create a Trust.
- §164. A Certain Subject-Matter.
- §165. A Definite Object.
- §166. What Constitutes a Trust and What Does Not.
- §167. Precatory Words.
- §168. Purposes of Trusts.
- §169. Construction of Testamentary Trusts.
- §170. Duties of Trustees.
- §171. Effect of Failure of a Trust.
- §172. Power. Definition.
- §173. Construction of Testamentary Power.

§162. Trusts—Testamentary—Elements.

A trust is a confidence reposed in some other, not issuing out of the land but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land for which the *cestui que trust* has his remedy in equity¹. It is only courts of equity that take cognizance of the trusts and enforce them. The doctrine of trusts is equally applicable to real and personal estates, and the principles that govern one will govern the other. A testamentary trust is one created by will, and the legal title to

1. "A trust is an obligation upon a person arising out of a confidence reposed in him to apply faithfully and according to such confidence."

"A trust is in the nature of a disposition by which a pro-

prietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it should be applied to certain uses for the behoof of a third party." Perry on Trusts, vol. 1, p. 2.

the property devised or bequeathed is vested in the trustee, while to the *cestui que trust* is given certain specified property rights in the realty or personalty devised or bequeathed to the trustee. In accordance with the statute^{1a}, a devise of lands to executors or other trustees, to be sold or mortgaged when such trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees, but the trust shall be valid as a power, and the land shall descend to their heirs, or pass to the devisees of the testator, subject to the execution of the power. Again, under the statute^{1b}, express trusts may be created for any or either of the following purposes:

(1) To sell land for the benefit of creditors;

(2) To sell, mortgage or lease lands for the benefit of legatees or for the purpose of satisfying any charge thereon;

(3) To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed by law;

(4) To receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for either of the purposes and within the limits prescribed by law;

(5) For the beneficial interest of any person or per-

1a. C. L. '97, §8840. A conditional power of sale see *Petit v. Flint, etc.*, R. Co., 114 Mich. 362, 72 N. W. 238. A will, which provides for sale of real estate and for a distribution of the proceeds by the executors, without stating who shall make the sales, but clearly expressing the intent to

deprive the devisees to whom the proceeds are to be paid from making them, confers the power of sale, as a naked power, without estate or interest, upon the executors, but not to vest any estate or title in them. *Mendelbaum v. McDougall*, 29 Mich 78.

1b. C. L. '97, §8839.

sons when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed by law;

The requisites necessary to create a valid trust are, first, words sufficient to create a trust; second, a certain subject-matter; third, a definite object.

§163. Words Sufficient to Create a Trust.

The principle is well established that no express or technical words to create a trust are requisite, if the intent to devote the estate to a particular purpose is apparent from the terms of the will². Neither is the form of the instrument by which the trust is created essential³.

§164. A Certain Subject-Matter.

The subject-matter of the trust must be certain, definite and complete⁴. Where a bequest fails to designate the securities in which investments shall be made under a clause, "to invest and from time to time reinvest," the bequest is not void for uncertainty⁵.

§165. A Definite Object.

It is sufficient if the object of the trust, declared and set forth in a will is definite⁶.

§166. What Constitutes a Trust and What Does Not.

It is apparent to constitute a trust, there must be either

2. Dean v. Mumford. 102 Mich. 510, 61 N. W. 7.

3. Packard v. Kingman, 109 Mich. 497, 67 N. W. 531.

4. Packard v. Kingman, 109 Mich. 497, 67 N. W. 531.

5. Caspari v. Cutcheon, 110 Mich. 86, 67 N. W. 1093.

6. Packard v. Kingman, 109

an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created⁷ and the creation of a trust does not depend on the use of any particular form of words, but it may be inferred from the facts and circumstances of the case. However, in order to create a trust in the donor, there must be an act or series of acts, sufficient to divest him of the equitable ownership, and vest such ownership in the donee⁸. Thus where a wife did not take an absolute estate in the *residuum* of the property after the payment of the legacies, the executors took the legal title to the residue and the wife took the equitable title⁹. Where a testator made provisions in his will as follows: He gave to his wife the homestead, furniture, etc., for life, directing the executors to pay all the taxes and repairs on the homestead and to pay her a specified amount per annum during her natural life, and bequeathed the residue of his estate to his children, a charge was created on the estate in the form of a trust¹⁰. It is manifest that a bequest of a fund to trustees "to invest, and from time to time reinvest, in such income-producing investment as they shall deem for the best interests of the trust," creates a valid trust¹¹.

Where a testator, by his last will, gave to his son and only child, a minor, at the age of 21, \$3000, and \$1000 annually thereafter, until 25 years old, when he was to

Mich. 497, 67 N. W. 551.

7. O'Neil v. Greenwood, 106 Mich. 572, 64 N. W. 511.

8. O'Neil v. Greenwood, 106 Mich. 572, 64 N. W. 511.

9. Barnes v. Marshall, 102 Mich. 248, 60 N. W. 468.

10. Dean v. Mumford, 102

Mich. 510, 61 N. W. 7.

11. Caspari v. Cutcheon, 110 Mich. 86; 67 N. W. 1093; King v. Merritt, 67 Mich. 194, 34 N. W. 689; Haddon v. Hemingway, 39 Mich. 615; Battelle v. Parks, 2 Mich. 531.

have \$10,000 more, if, in the opinion of the executors named, he had used the amounts received in a judicious, frugal manner; and at the age of 35 years, or sooner, if the executors thought best, and upon the same conditions he was to receive the possession of the balance of the father's estate, both real and personal, not otherwise disposed of under the will; but if at 20, and after the receipt of the \$10,000, the son had squandered and wasted what he then had received, and if in the opinion of the executors, he would continue to do so, he then was to receive but the \$1000 annually, and the estate, subject to the other provisions of the will, was to go to the legal issue of the son, and, if he died without issue, it was then to pass to the legal heirs of the testator and no trust estate passed to the executors for they were only executors with certain additional powers¹².

§167. Precatory Words.

The essence of the doctrine of precatory trusts is that the words creating them, while in form the expression of a request, wish, or recommendation on the part of the testator, are, in fact, intended by him as a positive direction or command obligatory upon the person to whom they are addressed¹³. Where the testator had no legal authority, independent of contract, to direct by will what disposition should be made of the real estate, no precatory trust resulted¹⁴.

12. *Perrin v. Lepper*, 72 Mich. 454, 40 N. W. 859; *Rock River Paper Co. v. Fisk*, 47 Mich. 212, 10 N. W. 344.

13. *Trustees of Hillsdale*

College v. Wood, 145 Mich. 657, 108 N. W. 675.

14. *Trustees of Hillsdale College v. Wood*, 145 Mich. 657, 108 N. W. 675.

§168. Purposes of Trusts.

Trusts are not uncommon. They appear frequently in one form or another. It is manifest that by means of a trust a variety of objects can be carried out, such as, providing for the support of minors, incompetents, invalids, married women and spendthrifts; establishing of charities; granting of annuities; paying off of debts and incumbrances; prolonging the time of the administration beyond the time given by statute so as to protect the property from sacrifice and forced sale and continuing the business of the testator¹⁵. Necessarily all such trusts are express trusts and usually active and in most cases the duties consist in nothing more than collecting and paying over the income. However, there is a distinction between an express trust for an indefinite purpose, and those cases where, from the indefinite nature of the purpose, the court concludes that a proper trust could not have been intended, though words may have been used, which, had the objects been definite, would by construction impart a trust. In the first description of cases the devisee does not take beneficially; in the latter, he does. A *residuum* in a will which provides that the trustee shall appropriate it to defraying the expense of the trust, or in such other or different manner as he may deem best, is indefinite in purpose and does not mean that it is a disposition of property in favor of the trustee, but, to the contrary, the property goes to the heirs the same as if the testator had died intestate¹⁶.

15. Ward v. Ward, 17 D. L. N. 929.

16. Abrey v. Duffield, 149 Mich. 248, 112 N. W. 936.

§169. Construction of Testamentary Trusts.

It is manifest that no general rule can be laid down for the purpose of determining when a devise or bequest in a will carries with it a beneficial interest. The intention can only be gathered from the general and natural scope of the instrument. In a case where a devise to sons of the testator was upon a trust expressly declared in the will, for the support of the wife of the deceased and to work the farm in a good and workmanlike manner, and the devise was upon the further trust to the executors, ancillary to that imposed upon the sons, "to see that all the conditions of this, my last will and testament, are fully carried out and performed as herein expressed," this devise is construed as not vesting an estate in the sons which is subject to execution and sale for the purpose of satisfying their debts¹⁷.

§170. Duties of Trustees.

When a man dies he ceases to be owner of his property and all his property, both real and personal, must pass to some other person. The general rule is that the legal title to the real estate, not otherwise disposed of, vests in the heirs at law, while the legal title to personalty vests primarily in the executor. The duties of an executor are in the nature of a trust. But they are prescribed by law and are under the supervision of the probate court. It is not infrequent that the executor is burdened with the duties of a trustee. The duties of a trustee depend upon

17. *Lee v. Enos*, 97 Mich. 277, 56 N. W. 550. See *Bennett v. Chapin*, 77 Mich. 526, 7 L. R. A. 377, 43 N. W. 893.

the nature of the trust. It may be said that a trustee in that capacity has limited powers and very few rights by law. He has practically no discretion. The powers he may exercise are such as are conferred upon him by the instrument creating the trust. The question of discretion is rather narrowly construed, for it is generally personal to the trustee named, and it cannot be extended beyond the circumstances foreseen and provided for by the testator. It is settled that the power of discretion given to trustees jointly cannot be exercised independently by one of them¹⁸. Trustees are prohibited from accepting benefits that are not provided for by the trust¹⁹. Where in a will something is directed to be done which in its nature is proper subject for trusts, the executor may be called upon to act as trustee by implication. In a case of this kind it is advisable to keep the duties of the executor distinct from those of the trustee. It does not follow that the trusteeship merges in the executorship where both functions are performed by one and the same person. Where a will made the executor also trustee, the receipt of the property on the final settlement with the executor did not estop the *cestui que trust* from requiring an accounting by the trustee for the moneys and property that came into his hands under the trust²⁰. In such cases the proper course for the executor to pursue is first to discharge his duties as executor by winding up and properly distributing the estate, and by paying over to himself as such trustee all the property left in trust and then to proceed to manage the property as trustee for the benefit of the

18. Loud v. Winchester, 52 Mich. 174, 17 N. W. 784.
19. Loud v. Winchester, 52 Mich. 174, 17 N. W. 784.
20. Worden v. Kerr, 91 Mich. 188, 51 N. W. 937.

cestui que trust. It is the duty of the executors before paying over the "net income" of the estate to deduct the necessary expenses, such as taxes, repairs, and costs of collection, incurred in caring for the estate²¹, and it is further their duty under a will bequeathing to them a sufficient amount of money to be by them invested in the best government bonds to the amount of \$75,000 to invest in such bonds an amount sufficient to secure \$75,000 principal²². A codicil revoked an executor's appointment as trustee thereby substituting the later appointee to perform the trust duties in his place²³.

In general it may be said that the will creates the trust, appoints the trustees, fixes their duty, and no action of the court is necessary to complete the trusts²⁴.

§171. Effect of Failure of a Trust.

The effect of failure of a trust where a will provided annuities for the children of a testator, all of whom were under twelve years of age at the time of his death, and it set aside certain real estate to be held "for the purpose of aiding in carrying out this trust," and where otherwise it gave the executors a general power to sell and a residue to the children's children, after the death of all the children and on the majority of the youngest grandchildren, continuing the annuity of any deceased child to the children of such child until the division, is void as far as the reservation of the specified land and of the accumulation therefrom is antagonistic to the statute²⁵, for any period

21. *Dickinson v. Henderson*, 122 Mich. 583, 81 N. W. 583.

22. *Wisner v. Kleinhans*, 69 Mich. 307, 37 N. W. 290.

23. *Palmer v. Keam*, 54 Mich. 617, 20 N. W. 613.

24. *Worden v. Kerr*, 91 Mich. 188, 51 N. W. 937.

25. C. L. '97, §8819. An ac-

beyond the minority of the youngest child, and for that reason the heirs take the land by intestacy, subject only to the accumulations so far as needed to pay the annuities of the children, while the remainder, like the land, passes to the heirs at law²⁶.

§172. Power. Definition.

A power is an authority to do some act in relation to real property, or to the creation or revocation of an estate therein or a charge thereon, which the owner might himself perform for any purpose²⁷. It is apparent that a power does not confer any estate.

§173. Construction of Testamentary Power.

A power under a will to sell and convey real estate in

cumulation of rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real estate as follows:

1. If such accumulations be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority;

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this chapter permitted for the vesting of future estates, and during the minority of the persons for whose benefit it is di-

rected, and shall terminate at the expiration of such minority.

C. L. '97, §8820. If in either of the cases mentioned in the last preceding section, the directions for such accumulation shall be for a longer time than during the minority of the persons intended to be benefited thereby, it shall be void as to the time beyond such minority; and all directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void.

26. *Wilson v. Odell*, 58 Mich. 533, 25 N. W. 506.

27. C. L. '97, §8897. The term "power" is defined to be an authority to do some act in relation to real property, or to the creation or revocation of an estate therein or a charge thereon, which the owner

fee simple for the donee's own use and benefits is not affected by statute²⁸. The devise to a sister, contingent upon her remaining unmarried, is good where the trustee is authorized to sell the real estate and other property of the deceased, but is required to immediately reinvest it and to which the statute of perpetuities applies²⁹. A power of sale coupled with an interest, although not a naked one, was one which related to the land, and as such survived to the executor of the legatee³⁰. A sale of land without the direction of the judge of probate is void, although the husband devised all his real estate to his wife for the purpose of being used for her support and maintenance during her natural life, and directs that, if the rents and profits arising therefrom shall prove insufficient for such support and maintenance, she may, under the direction of the judge of probate sell and convey so much of the land as shall be sufficient therefor, and that, if any of the real estate remains unsold at her death, it shall be equally divided among the heirs of the testator³¹. A power by which a fund is to be used for the support of a person, cannot be appropriated to the building or completion of a dwelling house³².

granting or reserving such power might himself perform for any purpose.

28. *Dexter v. Gordon*, 136 Mich. 235, 98 N. W. 1016. C. L. '97, §9087. No license to sell real estate shall be granted, if any of the persons interested in the estate shall give bond to the judge of probate, in such sum and with such sureties as he shall direct and approve, with condition to pay all the debts, and the expense of administra-

tion, so far as the goods and chattels, rights and credits of the deceased shall be insufficient therefor, within such time as the judge of probate shall direct.

29. *Niles v. Mason*, 126 Mich. 482, 85 N. W. 1100.

30. *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228.

31. *Bates v. Leonard*, 99 Mich. 296, 58 N. W. 311.

32. *Morford v. Dieffenbacher*, 54 Mich. 593, 20 N. W. 600.

CHAPTER XI.

VESTED AND CONTINGENT ESTATES.

- §174. Vesting of Estates.
- §175. Creation of Vested and Contingent Estates.
- §176. Distinction Between Vested and Contingent Estates.
- §177. Opening of Vested Remainders for Newly Born Remainderman.
- §178. Vested Defeasible Remainders.
- §179. Contingency Resting Upon Person.
- §180. Difference of Time of Vesting Estates Where Time of Payment is Postponed.
- §181. The Time When Contingent Estate Became Vested.
- §182. When a Vested Estate is Divested.
- §183. Property Out of Which Legacies Are Payable or Charged.
- §184. Types of Contingencies Upon Which Estates Depend.
- §185. Construction of Vested and Contingent Estates.

§174. Vesting of Estates.

It may be said that a title is vested in a person when he has a certain definite interest in some particular piece of property or fund, which, if not specially restrained, has all the attributes of ownership. The title under such circumstances passes to his heirs upon his death, and the estate is liable for his debts and engagements. The personal property vests in the executors for the purpose of administering the estate and the payment of debts and legacies. It is not apparent what property is available for the payment of general residuary bequests until administration is had and the debts are paid. In the event of a devise of real estate, unless expressly made contingent, it vests immediately in the devisee, subject, however, only to be

taken if necessary for the payment of testator's debts, while a bequest passes to the executors and then by them vested in the legatees. A devise made to members of a class, for example, to children, gives rise to some difficulty in regard to determining when the estate vests. The general rule may be stated that all the children will take, under a will where children are designated as a class and no further description is given, who answer the description at the time the will took effect. The vesting of the various interests is not postponed, under a will in which the division is to be made at a future time, unless express provision has been made to that effect. In the case of realty it is only the time of possession that is postponed.

§175. Creation of Vested and Contingent Estates.

Estates are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the coming of the immediate or precedent estates¹.

Estates are contingent while the person to whom, or the event upon which they are limited to take effect, remain uncertain².

Where an estate to A. for life, remainder to B. and his heirs is limited, a vested remainder passes to B., for the reason that his interest will come into possession the

1. C. L. '97, §8795.

2. C. L. '97, §8795. Future estates are either vested or contingent.

They are vested when there is a person in being who would have an immediate right to the

possession of the lands, upon the ceasing of the immediate or precedent estate;

They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remain uncertain.

moment A.'s estate terminates, but if A. should survive B., B.'s interest goes to his heirs, devisees or alienees.

Where an estate to A. for life and after his decease to the eldest son of B., living at the time of A.'s decease and his heirs is limited, a contingent remainder is created.

§176. Distinction Between Vested and Contingent Estates.

The legal distinction between vested and contingent estates is not always clear, but courts have agreed in, first, favoring the vesting of interests, and second, in treating future interests as vested where there is any present interest in the income of the property³. A vested estate, whether present or future, may be absolutely or defeasibly vested. In the latter case, it is vested, subject to being divested on the happening of a contingency subsequent⁴. In general it may be said that by the statute, contingent estates are made to depend upon two conditions,—one is while the person to whom the estate is given remains uncertain, and the other when the event upon which such estates are limited to take effect remains uncertain.

When a grant is "limited to a man and the heirs of his body, without any further specification," an absolute fee vests in the grantee⁵. It is manifest that although estates tail are abolished, the statute has given to what would otherwise be such an estate the force of an estate in fee simple⁶, and has provided that when a remainder is limited, if an estate tail were permitted, would be such an estate, such remainder shall be valid as a contingent limi-

3. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

Rep. 310, 50 N. W. 1077.

4. *L'Etourneau v. Henquet*, 89 Mich. 428, 28 Am. St.

5. *Rhodes v. Bouldry*, 138

Mich. 144, 101 N. W. 206.

6. C. L. '97, §8785.

tation upon a fee, and shall vest in possession on the death of the first taker without issue living at the time of such death"⁷.

§177. Opening of Vested Remainders for Newly Born Remainderman.

Where life estates, by purchase, became merged in the vested estates in remainder, and no interest was outstanding, no portion of the title could be divested except by the birth of another child; but this could not divert the entire title of either, for the reason that it would only take away so much of the title as would give the newly born heir an equal interest with them⁸.

§178. Vested Defeasible Remainders.

The rule is well established that the estate is created at the death of the testator, and not at the time the will is executed and that the time of remoteness is to be determined from the time of the death of the testator, and it is said that although the creation of the estate takes place at the testator's death, the lives must be then in being. A vested remainder may be conditional the same as other estates, and it is manifest that although the remainderman is in existence at the time of the determination of the particular estate, the vested remainder will not always take effect. Thus, where A. died—not surviving the testator under a devise to A. for life after his death to B., and, in case of B.'s death without heirs to C. and D. with a re-

7. C. L. '97, §8786. Goodell v. Hibbard, 32 Mich. 47.

8. Hovey v. Nellis, 98 Mich. 374, 57 N. W. 255.

mainder over to E. upon a like contingency, C. and D. do not take successive estates in the land, but each took a defeasible fee in an undivided moiety, upon B's death without issue⁹.

§179. Contingency Resting Upon Person.

It is manifest that where an estate is made contingent upon the death of a devisee, no estate vests until his death, and no interest passes to the next taker by the terms of the will, except a contingent estate, which ceases with his death, if he died before the devisee¹⁰.

§180. Difference of Time of Vesting Estates Where Time of Payment is Postponed.

The rule is well stated and settled that if a testator gives a legacy to A. B. at the end of 10 years after his death, the legacy is contingent, but if he gives it to A. B. to be paid to him at the end of the 10 years, it is vested¹¹. It is said that when there is doubt whether the words of contingency or condition apply to gifts or to the time of payment, courts are inclined to construe them to apply to the time of payment, and to hold the gift rather as vested than contingent¹².

§181. The Time When Contingent Estate Became Vested.

The general rule is that the law favors the vesting of estates at the earliest possible moment and therefore favors

9. *Mulreed v. Clark*, 110 Mich. 229, 68 N. W. 138.

10. *Fitzhugh v. Townsend*, 59 Mich. 427, 27 N. W. 561.

11. *Hibler v. Hibler*, 104 Mich. 274, 62 N. W. 361.

12. *McCarty v. Fish*, 87 Mich. 48, 49 N. W. 513.

the vesting of a contingent estate as soon as the contingency happens upon which it is based. Thus, where the contingency of the bequest rested upon the legatee making a choice, the moment the legatee exercised the right of choice by demanding the entire legacy, it became vested when the choice was exercised¹³. A vested contingent remainder takes effect in the surviving children and the heirs of any deceased child, where upon creating and vesting future estates the testator declares that, in the event of the life estate failing through the death of any of the devisees, the share of such devisees to be equally divided among the remaining devisees¹⁴. Where a testator gave his widow an estate for life in all property and in a residuary clause he declared that on her death the property should be equally divided between his "surviving children," a vested estate passed to all the children surviving at his death, and the heirs at law of any child who died before the widow were entitled to the share of their ancestor unless the will indicated otherwise¹⁵. An estate in remainder vests on the decease of the testator under a will devising a life estate in the widow and the remainder to the children "now living, or who may be at the time of her decease," to be equally divided¹⁶.

§182. When a Vested Estate is Divested.

Where under a will the testator declared that after the expiration of two years a legacy was to be paid upon the

13. *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228.

14. *L'Etourneau v. Hen-
quet*, 89 Mich. 428, 28 Am. St.

Rep. 310, 50 N. W. 1077.

15. *Porter v. Porter*, 50 Mich. 456, 15 N. W. 550.

16. *Rood v. Hovey*, 50 Mich. 395, 15 N. W. 525.

proviso that if in the judgment of the executors the legatee was a reformed man he should receive the legacy, the vested estate became divested through the provision which made it conditional¹⁷.

§183. Property Out of Which Legacies are Payable or Charged.

The general rule is that the personal estate is the fund for the payment of legacies provided the testator has not declared otherwise¹⁸, but when the personalty fails the realty may be charged therewith. A present vested estate is created in the legatee at the death of the testator subject to a trust where a devise to minor children consists of the net accumulations of a mixed fund of realty and personalty in the form of rents and profits out of which a certain amount is to be paid to them annually upon the youngest reaching the age of majority¹⁹.

§184. Types of Contingencies Upon Which Estates Depend.

"I give and devise to my wife, Caroline my farm in the township of Freedom, county and State aforesaid, consisting of two hundred acres, to be enjoyed by her as long as she shall remain my widow. In case of her marriage my daughter Caroline shall take the said farm, to be enjoyed by her during her life, and after her decease the said farm shall be divided among her issue, share and share alike."

"I give and bequeath to my said wife all my personal

17. *Markham v. Hufford*, 123

Mich. 505, 48 *L. R. A.* 580, 81

Am. St. Rep. 22, 82 *N. W.* 222.

18. *McCarty v. Fish*, 87

Mich. 48, 49 *N. W.* 513.

19. *Toms v. Williams*, 41

Mich. 552, 2 *N. W.* 814.

estate on my said farm at the time of my death, to be used and enjoyed by her as long as she shall remain my widow. In case of her marriage such property shall pass to my daughter Caroline accordingly." The rule applicable in this case is that a devise or bequest to a widow for life, if she shall not marry, and, if she shall marry, then over to another person, vests the remainder in the latter, if she dies unmarried. ,

Thus, the wife received a life estate terminable upon her marrying again and in the event of her remarriage or death the daughter to receive a life estate and her children a vested remainder in fee²⁰; so where a bequest reads as follows: Fourth, I give and bequeath to my beloved son. F. S., when he arrives at the age of twenty-one years, \$3,000, and \$1,000 annually thereafter, until he arrives at the age of twenty-five years, and if at that time he shall have used what he has received, as above stated, in a judicious frugal manner, and not wasted and squandered it (in the opinion of my executors hereunto appointed) he shall then receive \$10,000 more; and if, at the age of thirty years, or sooner, if in the opinion of my said executors he shall have managed, and will continue to do so, what he has already received, in a judicious, frugal manner, he shall receive \$15,000 more; and if, at the age of thirty-five years, or sooner, if in the opinion of said executors, he shall have, and will still continue to use what he has received, as before stated, in a frugal, economical and judicious manner, he shall come into full possession of all my estate, personal and real, not otherwise disposed of by this will, or otherwise.

20. Haab v. Schneeberger, 147 Mich. 583, 111 N. W. 185;

But if, after having received \$10,000 at the age of twenty-five years, he shall have squandered and wasted what he has already received, or in the opinion of said executors he will waste and squander what he received, he shall thereafter receive but \$1,000 annually, and all my estate, real and personal, not otherwise disposed of, shall go to the legal issue or children of my beloved son, F. S.; but, in case he dies without said issue or children, then, in that case, it shall go to my legal heirs and representatives equally, according to law, except my beloved sister, R. C., and her heirs, who shall receive only five dollars." This devise is based upon certain contingencies which if they happen may pass the estate from the son to others²¹.

§185. Construction of Vested and Contingent Estates.

It is the policy of the statute to favor vested rather than contingent estates unless a contrary intention is manifest²², and the general rule is that a will becomes operative at the death of the testator, from which time the estates vest²³.

Curtis v. Fowler, 66 Mich. 696,
33 N. W. 804.

21. Perrin v. Lepper, 72
Mich. 454, 40 N. W. 859. See
Fitzhugh v. Townsend, 59 Mich.
427, 27 N. W. 561; Plant v.

Weeks, 39 Mich. 117.

22. Toms v. Williams, 41
Mich. 552, 2 N. W. 814.

23. Union Mut. Ass'n v.
Montgomery, 70 Mich. 587, 38
N. W. 588.

CHAPTER XII.

CONDITIONS AND RESTRICTIONS.

- §186. Conditions.
- §187. Condition Regarding Marriage.
- §188. Condition Forfeited.
- §189. Conditions Relating to Support.
- §190. Conditions as to Reformation Valid.
- §191. Conditions of Restraint or Alienation.
- §192. Construction of Conditions.

§186. Conditions.

It is not infrequent to find in a will an estate devised upon condition. When such is the case, it becomes important that the exact nature and effect of the condition is ascertained. Conditions are either precedent or subsequent. The rule of law is certainly well established that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause or of the whole will shows that the act on which the estate depends must be performed before the estate can vest, the condition is, of course, precedent, and, unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it—if this is to be collected from the whole

will—the condition is subsequent¹. A valid condition precedent obtains where a legacy is made payable to the legatee two years from the date of the death of the testator upon the condition that the legatee, in the judgment of the executors, shall be deemed a reformed man². A valid condition subsequent obtains where in a will the provision for the son dying without issue means his dying without issue after it had been determined by the executors as provided by the will, that the conduct and promise of the son are unsatisfactory³. Where a condition precedent was not complied with, the estate never vested⁴, and in the event of a condition precedent in a devise being void, the devisee takes an estate clear of conditions⁵. The general rule is that an estate granted upon a condition subsequent which becomes impossible can never be divested⁶.

§187. Condition Regarding Marriage.

The general rule is that where a testator gives to a woman a life interest if she so long remains unmarried, and then directs that in the event of her marrying, the property shall go over to another, although according to the strict language, the gift over is expressed only to take effect in the event of the marriage of the tenant for life, the gift over

1. *De Conick v. De Conick*, 154 Mich. 187; *Markham v. Hufford*, 123 Mich. 508, 48 L. R. A. 580, 81 Am. St. Rep. 222, 82 N. W. 222. The statement of this rule is in the word of Chief Justice Marshall in the case of *Finley v. King's Lessee*, 3 Pet. (U. S.) 340.

2. *Markham v. Hufford*, 123 Mich. 503, 48 L. R. A. 580, 81 Am. St. Rep. 222, 82 N. W.

222; *Johnson v. Warren*, 74 Mich. 49, 42 N. W. 74.

3. *Rock River Paper Mill Co. v. Fish*, 47 Mich. 212, 10 N. W. 344.

4. *Johnson v. Warren*, 74 Mich. 491, 42 N. W. 74.

5. *Conrad v. Long*, 33 Mich. 78.

6. *Conrad v. Long*, 33 Mich. 78.

is held to take effect, even though the tenant for life does not marry. Thus, an estate for life is conveyed on condition, where a devise of the rents, profits, and income during the widow's life, or so long as she should remain a widow is made⁷, but where annexed to a devise in condition that a married woman shall not live with her husband, the condition is void as being against public policy⁸.

§188. Condition Forfeited.

Where a testator devised his property to his wife for life, and bequeathed to a nephew who lived with him a legacy of \$700 upon the condition that "if the said nephew shall continue to live with my family and on my estate, until he shall arrive at the age of 21 years, and labor as faithfully as he has labored for me," and where before the nephew became of age he left the family of his aunt and worked on another farm for wages, although he was warned that he would forfeit his legacy, it was decided that the legacy was thereby forfeited⁹, owing partly to the long delay in the nephew asserting his claim.

§189. Conditions Relating to Support.

It is perfectly in accord with the policy of the law that a devise resting upon a condition that the devisee shall support a person named is legal and proper¹⁰.

§190. Conditions as to Reformation Valid.

Where a condition is inserted in a devise that the devisee

7. *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61.

8. *Conrad v. Long*, 33 Mich.

78.

9. *Pearl v. Lockwood*, 123 Mich. 142, 81 N. W. 1087.

10. *Pearl v. Lockwood*, 123

shall not take the grant or bequest before he settles down and marries, or reforms from intemperate and bad habits, such condition is valid¹¹.

§191. Conditions of Restraint or Alienation.

It is well settled that provisions in restraint of alienation are not to be favored¹², and it is manifest that at common law a condition or restriction which would suspend all power of alienation of vested estates in fee, even for a single day, is void¹³.

§192. Construction of Conditions.

Conditions are not favored in law when they defeat estates, and they should not for a moment be subject to be continued at the option or through the misconduct or neglect of others where any other commission is reasonable¹⁴.

Mich. 142, 81 N. W. 1087.

11. Markham v. Hufford, 123 Mich. 505, 48 L. R. A. 580, 81 Am. St. Rep. 222, 82 N. W. 222.

12. Walton v. Torrey, Har. 259.

13. Mandelbaum v. McDonnell, 29 Mich. 78, 18 Am. Rep. 61.

14. Calkins v. Smith's Estate, 41 Mich. 409, 1 N. W. 1048; Walton v. Torrey, Har. 259.

CHAPTER XIII.

PERPETUITIES AND CHARITABLE DEVICES.

- §193. Perpetuity. Definition.
- §194. Distinction Between the Three Aspects of the Rule.
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- §237. The Rule That Obtains as to Accumulation of Rents and Profits —Annuities to Children.
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- §239. Charitable Devises or Uses.
- §240. Constitutional and Statutory Provisions as to Charitable Devises or Uses.
- §241. Statutes Relating to Time When Charitable Devises Must be Made.
- §242. Who May be Beneficiaries.

§193. Perpetuity. Definition.

Perpetuity may be defined as "a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation."¹ Again, perpetuity may be defined as a future limitation whereby the vesting of an estate or interest is unlawfully postponed, not because the grant as written would make them perpetual, but because it transgresses the limits which the law has set

1. Mr. Lewis' Work on Perpetuities.

in restraint of grants that tend to a perpetual suspense of the title or its vesting². These definitions, although not perfect, come more nearly to expressing the true meaning of perpetuity than any other. The difficulty in formulating an exact definition arises from the fact that a series of decisions³ have maintained that alienability of the property may be regarded as the test of perpetuity, while others⁴ maintained that alienable estates may create a perpetuity. Thus, under the general doctrine of perpetuity by which restraints upon property are created, three aspects of the subject are to be considered:

- First, postponement of the vesting;
- Second, unlawful restraint on alienation;
- Third, unlawful accumulation of property.

§194. Distinction Between the Three Aspects of the Rule.

The distinction between the rule against perpetuity and the rule against restraint upon alienation lies in that the first refers to the time when the devise vests, while the second refers to the power the devisee has over his devise after it has been vested. The application of the rule against perpetuity depends upon the fact whether the interest or estate devised is vested or not⁵, while the application of the rule against restraint upon alienation depends on there being no persons in being by whom an absolute fee in possession can be conveyed or where the power of alienation in the

2. *Johnstone's Estate*, 185 Pa. St. 179.

3. *Winsor v. Mills*, 157 Mass. 362; *French v. Old South Soc.*, 106 Mass. 479; *Battle Square Church v. Grant*, 3 Gray (Mass.) 142, 63 Am. Dec. 725; *Odell v.*

Odell, 10 Allen (Mass.) 1; *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88.

4. *Avern v. Lloyd*, L. R. 5 Ey. 383.

5. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

devisee is suspended for a period beyond the time allowed by law⁶. Thus both rules are infringed where a devise is made for a time specified—not based upon lives—and the devise is to be used for a certain named purpose by which the power of alienation is affected, after which it is to pass to a beneficiary named. The rule against unlawful accumulation distinguishes itself from the others in that the period of accumulation under a will of the income of personal property may be made for any number of lives in being and for twenty-one years longer⁷, while the rule against accumulation of rents and profits is that the period of accumulation must not be for a period longer than during the minority of the persons intended to be benefited thereby⁸, but a provision for accumulating until the youngest of several minors arrives at the age of twenty-one is no violation of the rule⁹.

§195. The Object of the Rule.

The object of the rule against perpetuities is to have “a limit beyond which the hand of the dead may not fetter the property of the living.” It is manifestly unreasonable to allow a man to accumulate property after his death so as to cast moral turpitude and economic blights upon his descendants and thereby perpetrate a wrong upon the community. Thus, its object was to prevent the tying up of estates beyond a certain period and “making them incapable of answering the ends of social commerce and providing

6. *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N. W. 56.

7. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

8. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

9. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

for the sudden contingencies for private life for which property was at first established¹⁰."

§196. Origin of the Rule.

The courts in their application of the common law rule which forbade the limitation of a contingent remainder upon a remote possibility soon established by analogy a rule applicable to the limitation of the vesting of future estates and thus the rule against perpetuities became a *regula juris*¹¹. It was by judicial decisions that this result was finally accomplished. The rule finds application both in law and equity, and it is frequently spoken of as the rule of remoteness.

§197. The Rule at Common Law.

The period within which a contingent estate or interest must vest under the rule against perpetuities is a life or lives in being, and twenty-one years thereafter, with the addition of the period of gestation of a child *en ventre sa mere*¹². An analysis of this rule will show:

First, that the period of vesting the estate is measured by the number of lives upon which it is created, and the number of lives is of no consequence as long as they are

10. Bl. Com. Bk. II, 174. "The rule of the common law against perpetuities is one of the instances wherein the living principles of the unwritten common law of England, through the forming power of an independent judiciary, have gradually shaped themselves into an essential muniment and safeguard of social life and of successful industry, in not allowing the conceits or fancies of dying men, unwilling to lose

their hold upon the brief empire which property allows the living to embarrass and control the generations still possessing the functions of active life, by the tightening grasp of exclusive self-love." 1 Jarman, 226 and 227.

11. 2 Bl. Com. 170; *In re Ridley*, 11 Ch. D. 645; *Goldtree v. Thompson*, 79 Cal. 613.

12. *Thellusson v. Woodford*, 11 Ves. Jr. 112; *Haroley v. Northampton*, 3 Mass. 3, 5 Am. Dec.

in being when the contingent estate or interest is created, "for they must be all *in esse* during the life of the first devisee and it is 'for them all that the candles are lighted and are consuming together,' and the ultimate remainder is in reality only to that remainderman who happens to survive the rest, and it is also settled that such remainder may so be limited to take effect, unless upon such contingency as must happen (if at all) during the life of the first devisee¹³." Thus in reality the period is measured by the life of the longest liver of those to whom the estate is limited.

Second, that the term of twenty-one years may be added without any reference to the infancy of any person¹⁴.

Third, that the period for gestation can be allowed only where gestation actually exists in fact¹⁵.

The rule is one of property and not of interpretation, for the document is to be interpreted independently of any rule against perpetuities and its intention ascertained before the rule is applied¹⁶.

§198. The Nature of the Contingency.

The nature of the contingency on which the estate or interest is limited is of no consequence, for it is not the nature or character of the contingency that enters into the rule¹⁷, but the period within which the contingency or event must happen¹⁸.

66; *Barnum v. Barnum*, 26 Md. 119, 90 Am. Dec. 88.

13. 2 Bl. Com. 175.

14. *Barnitz v. Casey*, 7 Cranch (U. S.) 456.

15. *Thellusson v. Woodford*, 11 Ves. jr. 112; *Goldtree v.*

Thompson, 79 Cal. 613.

16. *Van Nostrand v. Moore*, 52 N. Y. 12.

17. *Lang v. Ropke*, 5 Sandf. (N. Y.) 363.

18. *McSorley v. Wilson*, 4 Sandf. (N. Y.) 515.

§199. Actual As Well As Possible Events Considered.

The general rule is that the event must happen within the period limited by the rule¹⁹. The possible events as well as the actual events are to be taken into account²⁰, and a remote possibility which is not likely to happen will be eliminated from the limitation and it will not be affected thereby²¹. It is evident that any future estate in order to be valid must be limited in such a manner that under every possible contingency they vest within the period prescribed or at the termination of that period.

§200. Alternative Limitations.

Alternative limitations may be valid or invalid according to the event happening within the period prescribed upon which they are constructed, but where one of two contingencies is valid and the other invalid on account of remoteness, the estate will vest²².

§201. To What Estates and Rights the Rule is Applied.

The rule against perpetuities applies to future estates or interests in both real and personal property²³, including legal and equitable estates²⁴ and all property rights, excepting vested estates or interests²⁵. It applies to a contingent

19. Matter of O'Hara, 95 N. Y. 417, 47 Am. Rep. 53.

20. Coggins' Appeal, 124 Pa. St. 10, 10 Am. St. Rep. 565.

21. Palms v. Palms, 68 Mich. 353, 36 N. W. 419.

22. Scheltter v. Smith, 41 N. Y. 328; Palms v. Palms, 68 Mich.

353, 36 N. W. 419.

23. Battle Square Church v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725.

24. Booth v. Baptist Church, 126 N. Y. 215.

25. Terrell v. Reeves, 103 Ala. 264; Lawrence's Estate, 136 Pa. St. 354, 20 Am. St. Rep. 925.

remainder²⁶, to an executory devise²⁷, and further it finds application to all conveyances or devises of whatsoever kind and to every form of limitation or condition by which such future estate or interest may be created²⁸.

§202. To What Estates and Rights the Rule Is Not Applied.

It being manifest that the rule is limited in its application against future contingent estates only, no vested estate or interest comes within its purview, because it cannot be subject to a condition precedent²⁹, neither does a common law remainder³⁰, or a lease for a term of years³¹. The question always to be considered is whether the estate or interest is vested or contingent³².

§203. The Common Law Rule Modified By Statute.

The common law rule against perpetuities has been modified by statute to the extent that it prohibits restraint upon alienation. The effect of the modification is that every future estate is void in its creation which, by reason of its limitation or condition, extends the power of alienation beyond the period prescribed by statute. Thus the question under the statute is whether the power of alienation is within the period prescribed by statute or not. The doc-

26. *Madison v. Larmon*, 170 Ill. 65.

27. *Carney v. Kain*, 40 W. Va. 785.

28. *Battle Square Church v. Grant*, 3 Gray (Mass.) 142, 63 Am. Dec. 725.

29. *Johnstone's Estate*, 185 Pa. St. 179, 64 Am. St. Rep. 621;

Lawrence's Estate, 136 Pa. St. 354, 20 Am. St. Rep. 925.

30. *Cole v. Sewell*, 2 H. L. Cases 186.

31. *Toms v. Williams*, 41 Mich. 553, 2 N. W. 814.

32. *Toms v. Williams*, 41 Mich. 553; 2 N. W. 814.

trine of remoteness is of no further consequence in so far as the question of the vesting of estates is concerned.

§204. Statute.

A perpetuity under a statute may be defined to be a limitation taking the subject thereof out of commerce for a longer period than prescribed by law. Thus, the absolute power of alienation shall not be suspended by any limitation or condition whatsoever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next paragraph³³; that is,

A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age³⁴.

§205. The Object of the Statute.

It has been said that the object of the statute is to prohibit the suspension of the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate, was to prevent the accumulation of large landed estates to be held in perpetuity, or for a long series of years³⁵, and the statutes restricting alienation are confined to avoiding future estates that are made more remote in their vesting than two lives in being, and such arrangements as serve to postpone them³⁶.

33. C. L. '97, §8797.

44 N. W. 1057.

34. C. L. '97, §8798.

36. *Toms v. Williams*, 41 Mich.

35. *Ford v. Ford*, 80 Mich. 42, 553, 2 N. W. 814.

Again, the statute is aimed solely at the alienation of land and does not apply where the trustees are given the power to sell, although they are given the power to tie up the proceeds of the sale beyond the time fixed by the statute³⁷. Its object does not cover accumulations³⁸.

§206. The Application of The Doctrine of Perpetuities Under the Statutes.

The rule finds application in whatever way the testator attempts to create a perpetuity, whether,

1. By devising successive estates for life to persons unborn, or,
2. By limiting an executory devise which is not to take effect within the period prescribed by law, or,
3. By means of a power, or,
4. By a devise in trust which would make the estate inalienable longer than the law permits³⁹.

§207. What Rules Obtain Under the Statute.

There are two rules regulating the disposition of property,—first, the statute applying to real property; and second, the common law rule applying to the creation of future estates or interests in the disposition of personal property⁴⁰. The difference between the two rules is material in that by the statute, future estates in land, to be good, must take effect, if at all, within or at the expiration of the two lives in being at the creation thereof, with a single exception,

37. *Thatcher v. St. Andrews' Church*, 37 Mich. 264.

38. *Toms v. Williams*, 41 Mich. 553, 2 N. W. 814.

39. *St. Amour v. Rivard*, 2 Mich. 294.

40. *Palms v. Palms*, 68 Mich. 353, 36 N. W. 419.

while by the common law rule no future interest, subject to a condition precedent, is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest. The rules that obtain under the statute are as follows:

First, The period within which a contingent estate must be subject to alienation is during the continuance of two lives in being at the creation of the estate, i. e., the absolute power of alienation cannot be suspended for a longer period⁴¹. This rule applies to real property.

Second, The period within which the contingent estate or interest must vest is a life or lives in being, and twenty-one years thereafter, with the addition of the period of gestation of a child *en ventre sa mere*⁴². This rule applies to personal property.

Third, The period for the accumulation of the income on personal property is for any number of lives in being, and for twenty-one years longer, the same as the second rule⁴³.

Fourth, The periods for the accumulation of rents and profits from real property are not longer than during the minority of the persons intended to be benefited thereby⁴⁴.

§208. The Effect of The Rule.

It may be stated that the effect of the rule against perpetuity under the statute is that a suspension of the period of alienation is void, unless based on lives⁴⁵.

41. C. L. '97, §8797. *Palms v. Palms*, 68 Mich. 353, 36 N. W. 419.

42. *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N. W. 56.

43. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

44. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

45. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

§209. When Power of Alienation is Suspended.

The power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed, and it is apparent that the period of suspension of alienation cannot be measured by time alone, that life must, in some form, be the measure of the period of suspension⁴⁶.

§210. When Power of Alienation is Not Suspended.

The absolute power of alienation is not suspended when there are at all times persons in being who can convey an absolute estate in possession⁴⁷.

§211. The Test of What Constitutes Suspension of Alienation.

The statutory test of what constitutes a suspension of the power of alienation as to real estate, and of absolute ownership as to personal property is that it occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed⁴⁸.

§212. Restraints Upon Alienation Are Not Favored in Law.

Many restrictions or qualifications upon the rights of the devisee or grantee may be made effectual by making the estate itself dependent upon such condition; but where the

46. *Casgrain v. Hammond*, 134 Mich. 419, 96 N. W. 510, 104 Am. St. Rep. 610.

47. *Torpy v. Betts*, 123 Mich.

239, 81 N. W. 1004.

48. *Torpy v. Betts*, 123 Mich. 239, 81 N. W. 1004.

estate granted is absolute, such restriction can impose no legal obligation upon the devisees, or limit their power over the estate, when the observance or violation of the restriction can neither promote nor prejudice any interest but their own⁴⁹.

§213. All Rights of Property Alienable.

The principle is well established that all rights of property are alienable, and that a condition or restriction which would suspend all power of alienation for any length of time is inconsistent with the estate granted, and therefore void⁵⁰ as against public policy.

§214. To What Estates the Rule Relating To The Power of Alienation is Applied.

The chief inquiry when applying the rule, is whether the estate or interest passing is vested or contingent⁵¹.

§215. Creation of Future Estates.

A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination by lapse of time or otherwise, of a precedent estate, created at the same time⁵².

A remainder is an estate which comes into existence when a future estate is dependent upon a precedent estate⁵³.

49. *Bennett v. Chapin*, 77 Mich. 526, 7 L. R. A. 377, 43 N. W. 893.

50. *Bennett v. Chapin*, 77 Mich. 526, 7 L. R. A. 377, 43 N. W. 893.

51. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

52. C. L. '97, §8792. *McIntyre v. McIntyre's Estate*, 156 Mich. 240; *State v. Holmes*, 115 Mich. 458; *Lariverre v. Rains*, 112 Mich. 276; *L'Etourneau v. Henquenet*, 89 Mich. 432.

53. C. L. '97, §8793. *State v.*

A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised⁵⁴.

Future estates are either vested or contingent:

They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate;

They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain⁵⁵.

Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed by law; such power of alienation is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed⁵⁶.

A future estate is created within the rule against perpetuities where a testator disposes of the residue of his estate by vesting the title in his two grandchildren, and providing that the residue shall be paid to them by the

Holmes, 115 Mich. 458, 73 N. W. 548; Lariverre v. Rains, 112 Mich. 276, 70 N. W. 583; L'Etourneau v. Henguenet, 89 Mich. 432, 50 N. W. 1077.

Case v. Green, 78 Mich. 544; See v. Deer, 57 Mich. 369, 24 N. W. 108.

54. C. L. '97, §8794. State v. Holmes, 115 Mich. 458, 73 N. W. 548.

55. C. L. '97, §8795. McIntyre v. McIntyre's Estate, 156 Mich. 242, 120 N. W. 587; Fullager v. Stockdale, 138 Mich. 366, 101 N. W. 576; Porter v. Osmun, 135

Mich. 361, 98 N. W. 859; Casgrain v. Hammond, 134 Mich. 419, 96 N. W. 510; State v. Holmes, 115 Mich. 158, 73 N. W. 548; Lariverre v. Rains, 112 Mich. 276, 70 N. W. 583; Hitchcock v. Simpkins, 99 Mich. 203, 58 N. W. 47; Hovey v. Nellis, 98 Mich. 379, 57 N. W. 255; Mutual Ass'n. v. Montgomery, 70 Mich. 595; Chambers v. Shaw, 52 Mich. 21, 17 N. W. 223; Rood v. Hovey, 50 Mich. 399, 15 N. W. 525; Goodell v. Hibbard, 32 Mich. 56. 56. C. L. '97, §8796. Casgrain v. Hammond, 134 Mich. 419, 96

executors in certain payments every fifth year, until they reach the age of forty-five, when the remainder shall be paid⁵⁷. The creation of an estate in which a suspension of the power of alienation, not based upon lives, is attempted, is void, for the power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed⁵⁸. Where the trustee is authorized to sell the realty and personal property of the testator and power is given the trustee to immediately reinvest the same, the statute of perpetuities applies to future estates of this character⁵⁹. A future estate created by a testator where a life estate was given in different tracts of land to each of his three children, with remainder over in each case to the body heirs of all such children, share and share alike, is void for the reason that the power of alienation is suspended during three lives in being, there being no way of ascertaining such body heirs until the death of all three children⁶⁰. The power of alienation was not suspended for a longer period than two lives in being where a testator created a future estate in remainder by which his estate was to be divided equally between his five children, or the survivor, of them, and, in case any of them died leaving children, the interest of deceased should go to them and that the portions designated for his sons, E., A. and H. be

N. W. 510; *Torpy v. Betts*, 123 Mich. 241, 81 N. W. 1094; *Fitzgerald v. City of Big Rapids*, 123 Mich. 281, 82 N. W. 56; *State v. Holmes*, 115 Mich. 458, 73 N. W. 54; *Petit v. Flint*, etc. R. Co., 114 Mich. 362, 72 N. W. 238; *Trufant v. Nunneley*, 106 Mich. 554, 64 N. W. 469; *Case v. Green*, 78 Mich. 545, 44 N. W. 578; *Palms v. Palms*, 68 Mich. 363, 36 N. W. 419; *Meth.*

Ch. of Newark v. Clark, 41 Mich. 740; *Thatcher v. St. Andrew's Church*, 37 Mich. 270.

57. *Hull v. Osborn*, 151 Mich. 8, 113 N. W. 784.

58. *Casgrain v. Hammond*, 134 Mich. 419, 104 Am. St. Rep. 610, 96 N. W. 510.

59. *Niles v. Mason*, 126 Mich. 482, 85 N. W. 1100.

60. *Trufant v. Nunneley*, 106 Mich. 554, 64 N. W. 469.

held in trust by the executors for such sons, "their wives and children," and the income be paid for the support of such sons, their wives and children, during the lives of said sons and their wives, to go upon the death of my said sons and their wives," to the children of said sons severally, and their heirs⁶¹. A future estate created by a conveyance of land by a person to his son and wife for their lives, and on their death to their son, living at the time of the conveyance, for his life, is not a restraint upon the power of alienation⁶². The creation of a future estate by which a testator left his property in trust, one-half of the income to be paid to his son for life and one-half to his daughter and first, on the death of either of his children, one-half of the estate to go to their issue and second, on the death of either child without issue, his or her share of the income to go to the survivor, and the principal to the survivor's issue on his death, and it was further provided that on the death of either of his children, the estate of a grandchild, who was a minor, should remain in trust until he became of age, does not violate the rule suspending the power of alienation beyond the period prescribed by law⁶³. A future estate created in the form of a contingent remainder is not too remote which depends on the death of the husband of the grantee of the life estate and on her own remarriage or death, as theirs are lives in being, under the statute⁶⁴ permitting the creation of freehold

61. *Dean v. Mumford*, 102 Mich. 510, 61 N. W. 7.

62. *Case v. Green*, 78 Mich. 540, 44 N. W. 578.

63. *Palms v. Palms*, 68 Mich. 363, 36 N. W. 419.

64. C. L. '97, §8806. Subject to the rules established in the pre-

ceding sections of this chapter, a freehold estate, as well as a chattel real, may be created to commence at a future day, an estate for life may be created in a term of years, and a remainder limited thereon.

estates, to begin at a future day⁶⁵. The limitation of a future estate over to minor children was not deemed too remote where a testator devised the residue of his estate to his sister "and her heirs forever," and in case of a failure of heirs, "all to fall and be bequeathed to the minor children" of a deceased brother⁶⁶. The creation of a future estate is void where a testator provided in his will that each disposal of real estate made by it should only be for the use and benefit of the person in whose favor it was made, his or her *life lasting*, and that no parcel of the real estate should be sold or alienated in any manner, but after the decease of those several to whom shares or parcels of the estate were assigned, said shares should remain for the use and benefit of the descendants of him or her to whom a share had been assigned, *their lives lasting, and so on*, and in case of demise without posterity, the said share should accrue to the use and benefit of the owners being of the testator's relation or descendants, *their lives lasting*, of the next share or shares, and so on, as long as any posterity should exist, and in case of extinction to the next heirs⁶⁷.

§216. When Estate Created.

The creation of the estate takes place at the death of the testator, and the lives must be then in being⁶⁸.

§217. Time of Remoteness. From What Period to Be Reckoned.

It is manifest that the object of the rule against perpetuities is to confine the vesting of contingent estates to a

65. Paton v. Langley, 50 Mich. 428, 15 N. W. 537.

66. Goodell v. Hibbard, 32 Mich. 47.

67. St. Amour v. Rivard, et al. 2 Mich. 293.

68. Mullreed v. Clark, 110 Mich. 229, 68 N. W. 138;

short period after the creation; and if it is certain when the estate is created that the contingent event must happen within the prescribed time, it is needless interference with the testamentary power to say that the estate is bad because at some time before the estate was created, and when its existence was entirely in the control of the testator, it was not certain that the contingent event would happen within the time required. The rule is that the question of remoteness is to be determined from the time of the testator's death, and not from the time when his will is established⁶⁹.

§218. Remainder Created In Favor of One Not In Being At Time of Testator's Death.

If the contingencies are all to happen within a life in being, the number of them is immaterial, for a remainder in fee after the expiration of two lives in being at that time and a second limitation may be good to one not in being, who may be living at the death of the first remainderman, if such remainderman die under the age of twenty-one⁷⁰.

§219. Valid Devises and Bequests Under the Statute.

A. gives a life estate to B., with remainder to C., on condition that he pay to D. a specified sum of money, and providing that, in the event of C. or D.'s death without issue before the death of B., the survivor shall take the fee, and that, in the event of the death of both without issue, before the death of B., the latter's life estate shall become a fee-simple and the power of alienation is not hereby

69. *Mullreed v. Clark*, 110 Mich. 229, 68 N. W. 989;

70. *Torpy v. Betts*, 123 Mich. 239, 81 N. W. 1094;

suspended for an unlawful period⁷¹. Where a testator devises the residue of the estate to his grandchildren and directs certain amounts to be paid to each of them at intervals of every five years until they reach the age of forty-five when the remainder is to be paid to them and in the event that both of the grandchildren should die without issue before reaching the age of forty-five years, then that portion remaining unpaid shall pass to other certain persons, this devise does not conflict with the rule under the statute⁷². Again, where a testator in a will created a trust in that the executor should hold certain land in trust for the benefit of the wife of the testator and his two sons or the survivor of them during their natural lives and then provides that on the death of the two sons the land should descend to their heir, the trust is valid and the power of alienation is not suspended beyond a period longer than two lives in being⁷³.

§220. Invalid Devises and Bequests Under the Statute.

Where a conveyance of lands creates a trust for a period of fourteen years and during the life of the grantor, after which time the land is to be distributed among certain persons, or the survivor or survivors of them, the trust is invalid for it suspends the power of alienation in a manner not based on lives⁷⁴. Where a testator devised a life estate to his wife with a remainder to the state upon the condition following: "If the state shall within the period of five years from and after the death of my said wife, formally accept

71. *Torpy v. Betts*, 123 Mich. 239, 81 N. W. 1094;

72. *Hull v. Osborn*, 151 Mich. 8, 14 D. L. N. 686;

73. *Foster v. Stevens*, 146 Mich. 131, 109 N. W. 265;

74. *Casgrain v. Hammond*, 134 Mich. 419, 96 N. W. 510;

of this provision of my will, and by due enactment, locate upon my real estate * * * some public educational or charitable institution, and build thereon suitable buildings for such purpose," otherwise to go to his grandson, the conditional devise, not being based upon lives at the time of its creation is invalid, for the suspension of the power of alienation of the estate must be based upon lives in being⁷⁵. Again, where a testator gives his wife the use of the homestead and makes the taxes and repairs and an annuity payable to her during her natural life from his estate by the executors, and then devises and bequeaths all the rest, residue, and remainder of all goods, chattels, real and personal to his five children, it is manifest that his intention was to make the entire estate, real and personal, subject to these charges, and the executors may devote the income of the estate, both real and personal, to that purpose, and are required to do so if necessity therefor exists, but the attempted restraint on alienation is void⁷⁶. In a case where a bequest in a will gave a certain sum to the trustees of a cemetery, a voluntary association, as a perpetual fund to be kept at interest by the trustees, and the interest thereof to be used and applied to take care of the graves on testator's lot as well as the lot itself, the bequest was deemed void for the reason that it created a trust against the statute of perpetuities^{76a}.

§221. Invalid Provisions Cannot be Made Valid By Widow Exercising Her Election.

Provisions incorporated in a will which are not valid when made and when the will takes effect, cannot be made

75. *State v. Holmes*, 115 Mich. 510, 61 N. W. 7;
 Mich. 456, 74 N. W. 548;
 76. *Dean v. Mumford*, 102, 76a. *Lounbury, Administrator*

valid by the widow exercising her right of election⁷⁷. If the exercise of this right were allowed under such circumstances, it would be equivalent to empowering the widow to execute a will by validating what was previously no will⁷⁸. In a case⁷⁹ the court said: "Accepting as correct the doctrine of the cases which hold that the widow becomes a purchaser of the legacy by releasing her dower, the contract is not a completed one until her acceptance of the provision of the will after her husband's decease. Had he purchased from his wife her dower, and given her his note therefor, upon his death such obligation if not paid would simply become a claim against the estate, and takes its place when proved against the estate with the other allowed claims. The husband during his lifetime, wishing to make arrangements to have his wife release her dower interest in the lands of which he should die seized, makes an offer therefor which is not to be submitted to her for acceptance until after his decease."

§222. Effect of Violation of the Rule Under the Statute.

It is manifest that a devise in violation of the rule against perpetuities is void, and if such be the case the property passes to the residuary devisees or legatees, if there are such; and if there are none, to their heirs or personal representatives. In such cases the effect is just as if the testator had not included such provision in his will, but had died intestate as to such property⁸⁰.

v. Trustees of Square Lake Burial Ass'n, 17 D. L. N. 1064. Mich. 510, 61 N. W. 7;
 77. Dean v. Mumford, 102 Mich. 510, 61 N. W. 7; 79. Tracy v. Murray, 44 Mich. 109, 6 N. W. 224;
 78. Dean v. Mumford, 102 Mich. 510, 61 N. W. 7; 80. State v. Holmes, 115 Mich. 456, 73 N. W. 548;

§223. Effect of Partial Violation of the Rule Under The Statute.

In a will having successive gifts, some of which are in violation of the rule against perpetuities and others of which are not, the question of the validity of the gifts which are not themselves in violation of the rule against perpetuities depends upon the closeness of the connection between the invalid gifts and the valid gifts. The rule is that if the gifts are consistent with the general scheme of the will, the valid gifts will be separated from the invalid, and the valid gifts will be sustained, while the invalid will be rejected⁸¹.

§224. The Prevailing Question Under the Statute.

It may be said that under the rule against perpetuities, as modified by modern statutes, the question is not primarily one of the vesting of the estate, but of the length of time during which the alienation of the fee is necessarily prohibited⁸². Thus a devise which is settled by trust or otherwise to last forever is clearly forbidden by the statutory rule⁸³. So is a devise for a fixed term of years without any reference to a life in being⁸⁴. Again where a devise is measured by lives so as to exceed the number of two lives in being permitted by statute, the devise is forbidden by the rule⁸⁵.

§225. An Executory Devise Exceeding The Period of Limitation Set By Statute.

The rule is well settled that an executory devise which

81. *Palms v. Palms*, 68 Mich. 641, 48 N. W. 156;
355, 36 N. W. 419; 84. *Farrand v. Petit*, 84 Mich.
82. *Farrand v. Petit*, 84 Mich. 641, 48 N. W. 156;
641, 48 N. W. 156; 85. *Trufant v. Nunueley*, 106
83. *Farrand v. Petit*, 84 Mich. Mich. 554, 64 N. W. 469;

exceeds the period allowed by statute is void, not only for the period within the law, but for the period in excess of that prescribed by statute⁸⁶.

§226. When The Power of Alienation Never Would Be Suspended.

It is evident that, under the statute⁸⁷, which provides that a remainder shall be limited to the heir, or heirs of the body of a person to whom a life estate in the same premises shall be given, the person or persons who, on the termination of life estate, shall be the heir or the heirs of the body of such tenants for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them. A remainder cannot be devised to one not *in esse* at the time of the creation of the estate. The rule is well established that an estate must go to persons *in esse*, and it is for that reason that the power of alienation would never be suspended because all the owners of the various estates could always join and convey the fee⁸⁸.

§227. Where a Contingent Remainder Vests as to Alienation.

Contingent estates by statute are made to depend upon two conditions—one, is where the person to whom the estate is given remains uncertain, and the other, when the event upon which such estates are limited to take effect remains uncertain. A devise by a testator to his wife, for and during her natural life of all of his real estate, which was

86. *St. Amour v. Rivard*, 2 Mich. 294.

87. C. L. '97, §8810.

88. *Torpy v. Betts*, 123 Mich. 239, 81 N. W. 1094;

particularly described in the will, and all that he might be seized of or possess at his decease, and all of his personal estate of every kind, with remainder over, after the determination of such life-estate, to his daughters, E., S. and El., to have and to hold the same to the said E., S. and El., their heirs and assigns, forever, and he making other dispositions of the remainder of other portions of his property, and further in the event that one or more of his children should survive him or his wife, he devised the share of each devisee or devisees in such case to be equally divided among the remaining children, and to their heirs, share and share alike, creates a vested future estate in E., S., and El. and is contingent and subject to be defeated by the death of E., S. and El. before the decease of the testator or of his wife and as to such the precedent estate in remainder terminated on the death of such child, and a contingent remainder was created in the surviving children, and the heirs of any deceased child, but such contingent remainder did not vest until the death of the wife⁸⁹, for it is the event and not the time or period that controls in determining the question as to whether the remainder is contingent or vested⁹⁰.

§228. Avoiding the Statute In Restraint of Alienation By Clothing Trustees With Power of Sale.

The principle may be stated that the absolute power of alienation is not suspended, where the instrument gives the trustees power to dispose of the property at their option⁹¹. Justice Champlin, who did not accede to this proposition,

89. *L'Etourneau v. Henquenet*, 89 Mich. 428, 28 Am. St. Rep. 310.

91. *Thatcher v. St. Andrews' Church*, 37 Mich. 264.

said: "The Statutes against perpetuities are directed against provisions by will or deed which prevent the vesting of estates *in the beneficiaries*; and, when such vesting is postponed beyond the limits allowed by law, the provision is void as being too remote. It can make no difference whether, during the time which shall lapse before it vests in the beneficiary, the estate vests in trustees, or is by them transferred to others than the beneficiary, and the proceeds and avails are held by the trustees subject to the trust; the policy of the law is defeated unless the contingency happens when the estate shall vest in the beneficiary within the prescribed limits. There would be but little use in statute or common-law restrictions against perpetuities, and the tying up of estates to await the happening of future events, if they could be avoided by merely clothing the trustees with power of sale, but subjecting the proceeds to the trusts declared, and by this simple device such postponement of the vesting of contingent interests be validated"⁹².

§229. Charges of Legacies on Real and Personal Property.

In general it may be said that the primary fund for the payment of legacies is taken from the personal estate unless the testator has otherwise directed and in the event that the personal estate should fail, the pecuniary legacies may be properly charged against the real property. Thus where there is a provision in the will that certain debts, legacies, and charges are to be paid, and the residue of the estate after these charges are settled is then to be divided, the particular debts, legacies and charges will be considered a charge against the estate, real and personal⁹².

92. *Palms v. Palms*, 68 Mich. 355, 36 N. W. 419;

§230. The Distinction Between The Palms' Will Case and The Niles' Will Case.

The wording of both these wills was identical excepting in the latter case there was added a clause by which a devise was made to the sister of the testator giving her an annuity of a specified sum per month, creating thereby a charge upon the property. This devise brought the case clearly within the rule established in a previous case⁹³, where a testator gave his widow a life estate in the homestead, and the executors, who were in fact trustees, were to pay the widow a specified sum per year during her life, the entire estate being burdened with the annuity and if necessary the entire income must be appropriated to pay it. It is manifest that the statutes in restraint of alienation are directed against provisions in conveyances by will or deed which prevent the power of alienation to be suspended beyond the period prescribed by law, and therefore will not support a charge upon the legacies which will be upon the property beyond the time limited by law.

§231. An Estate Placed In Trust and Alienation.

The rule against suspension of alienation for a longer period than two lives in being was not offended, where a will placed the estate in trust for the lives of two persons and provided that the executors should pay a certain sum annually to a third person⁹⁴.

§232. What Law Governs.

A foreign will directing the absolute and immediate sale

93. Dean v. Mumford, 102 Mich. 510, 61 N. W. 7;

94. Cole v. Lee, 143 Mich. 267, 106 N. W. 855;

of all the estate belonging to the testator in Michigan, and its conversion into lands in another State in which the trusts are declared, is not void although the Michigan Statute in restraint of alienation is violated⁹⁵.

§233. Construction of Statute.

The cardinal rule in the construction of wills is to ascertain the intent of the testator, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail⁹⁶. In construing the statute the above rule is not to be neglected. This statute was adopted in this state *verbatim et literatim* from the New York Statute of 1830, and it is manifest that the construction placed upon this statute by the courts of that state had had a controlling influence here, and courts will presume that the legislature recognized and accepted such construction⁹⁷. It is said in construing the legislative intent concerning certain trusts that in guarding against remote entanglements the legislative action which relates to perpetuities very carefully avoided the prevention of such trusts as might be necessary to save estates from being sacrificed or disposed of to pay charges or encumbrances. It is no part of the statutory policy to prevent land from being preserved as land for devisees, and when charges exist or are created which might involve either a sale or other burdensome interference with its actual enjoyment, trusts are expressly authorized, without being subjected to the perpetuity clauses, in order

95. *Ford v. Ford*, 80 Mich. 42, Mich. 131, 109 N. W. 265;
44 N. W. 1057.

97. *State v. Holmes*, 115 Mich.

96. *Foster v. Stevens*, 146 Mich. 456, 73 N. W. 548;

to save the estate from much worse consequences. These trusts are not subjected to the law of perpetuity⁹⁸.

§234. Accumulation.

Accumulating is the adding of the interest or income of a fund to the principal, or the withholding of income from present distribution, for the purpose of creating a constantly increasing fund for distribution at a future time, pursuant to the provisions of a will or deed⁹⁹.

§235. The Rule that Obtains as to Accumulations of Income From Personal Property.

The rule that obtains as to accumulations of the income of personal property under a will is the common law rule under which the utmost length of time allowed for the contingency of an executory devise to happen in was that of a life or lives in being, and twenty-one years afterwards¹⁰⁰. It is under this rule that one Peter Thellusson in 1796 devised his fortune to trustees, for accumulation during the lives of three sons and of their sons, and during the life of the survivors. At the death of the last survivor the fund was to be divided into three shares, one share for the eldest male lineal descendant of each of his three sons; upon failure of such descendant, the share to go to the descendants of the other sons. The testator left three sons and four grandsons living, and twin sons born soon after his death. It was found that at the death of these nine persons the fund would exceed nineteen million pounds;

98. *Toms v. Williams*, 41 Mich. 142, 70 Am. St. Rep. 302.
552, 2 N. W. 814;

100. *Toms v. Williams*, 41

99. *Hascal v. King*, 162 N. Y. Mich. 552, 2 N. W. 814;

and, upon the supposition of only one person to take and a majority of ten years, that the sums would exceed thirty-two million pounds.

The will was sustained in 1798 by the court of chancery¹⁰¹ and in 1805 by the House of Lords¹⁰².

§236. The Object of the Statute Forbidding Accumulations.

The statute¹⁰³ forbidding the accumulation of rents and profits is to prevent tying up real estate for the purpose of accumulation during extended periods, so that its continued rental might keep the property entire and undisposed of, and build up a large fund in connection with a landed estate¹⁰⁴. A provision in a devise covering a piece of property which was rented under a lease for a long term providing for its own renewal in the event the appraised value of buildings erected by the lessee should not be paid at the expiration, and other property, both real and personal by which a certain sum was to be annually set aside from the income of the whole, to constitute a sinking fund to pay for the building, is not void as against the statute of accumulation¹⁰⁵.

101. *Thellusson v. Woodford*, 4 Ves. 227.

102. *Thellusson v. Woodford*, 11 H. L. C. 112.

103. C. L. '97, §§819. An accumulation of rents and profits of real estate for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real estate, as follows.

1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority;

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this chapter permitted for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

104. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814;

105. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814;

§237. The Rule That Obtains as to Accumulation of Rents and Profits—Annuities to Children.

The rule concerning the accumulation of rents and profits is that the accumulation must not be for a longer period than during the minority of the persons intended to be benefited thereby¹⁰⁶. When a provision in a will provided for annuities to be paid to the children of the testator, all of whom were under twelve years of age at the time of his death, and further provision was made that certain real estate was to be held "for the purpose of aiding in carrying out this trust," otherwise a general power of sale was given to the executors; furthermore a residue to the children's children was given, after the death of all the children and on the majority of the youngest grandchildren, continuing the annuity of any deceased child to the children of such child until the division, the reservations of the specified land and of the accumulations therefrom are void for any period beyond the minority of the youngest child¹⁰⁷. Under these circumstances the land goes to the heirs, by intestacy, subject only to the accumulations so far as needed to pay the children's annuities, the rest, like the land, goes to the heirs-at-law and not to the grandchildren¹⁰⁸. It is manifest that a provision in a will giving directions that all royalties and other moneys received from the leases of mineral lands shall be treated as capital by the trustees, and invested for the benefit of the *cestui que trustant*, and such accumulations not to exceed the minority of the grandchildren of the testator then living, is not void¹⁰⁹.

106. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814;

107. *Wilson v. Odell*, 58 Mich. 533, 25 N. W. 506;

108. *Wilson v. Odell*, 58 Mich. 533, 25 N. W. 506;

109. *Palms v. Palms*, 68 Mich. 355, 36 N. W. 419;

§238. The Rule Concerning a Trust for Accumulation Beyond Period Prescribed.

The rule is that a trust for accumulation beyond the period prescribed by law is void only for the excess¹¹⁰.

§239. Charitable Devises or Uses.

A charitable devise may be defined as a disposition or a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by creating or maintaining public buildings or works, or otherwise lessening the burdens of government¹¹¹.

§240. Constitutional and Statutory Provisions as to Charitable Devises or Uses.

The law of charitable uses referred to as the statute of Elizabeth, commonly called the Statute of Charitable Uses is not in force in this state,—it having been repealed in 1810¹¹². The same requisites are essential to their validity as apply to other devises or trusts, for there is no distinction between charitable devises and any others¹¹³. Owing to the non-existence of the doctrine of charitable uses in this state a trust for charitable purposes was declared void¹¹⁴.

110. *St. Amour v. Rivard*, 2 Mich. 294.

111. *Jackson v. Phillips*, 14 Allen, 555.

112. 1 Territorial Laws 900.

113. *Meth. Church of Newark v. Clark*, 41 Mich. 730, 3 N. W. 207;

114. *Hopkins v. Crossey*, 132 Mich. 612, 96 N. W. 490, 96 N. W. 499;

§241. Statutes Relating to Time When Charitable Devises Must Be Made.

Although no statutes exist in this state relating to this question, yet it is deemed advisable to call attention to the construction placed upon them. Thus, many states provide by statute that a testator cannot by will devise or bequeath to a charitable corporation or its use, unless the devise or bequest in the will was made a specified time before the death of the testator¹¹⁵.

§242. Who May be Beneficiaries.

Any class of persons may be beneficiaries under a charitable devise. They may be foreign religious corporations¹¹⁶, unincorporated charitable societies¹¹⁷, towns¹¹⁸, cities¹¹⁹, parishes¹²⁰, school districts¹²¹, district libraries¹²², and trustees for unincorporated society for charitable or religious purposes¹²³. The beneficiary must be designated so as to insure certainty¹²⁴, likewise the trustees and owners¹²⁵. The question of capacity does not arise in cases of charitable devises, as to the trustees or donees¹²⁶.

115. *Kavanaugh's Will*, 125 N. Y. 418; *Reemiensnyder v. Gans*, 110 Pa. St. 17; *Milwaukee Protestant Home for Aged v. Beecher*, 87 Wis. 419, 45 Am. & Eng. Corp. Cas. 562.

116. *In re Ticknor's Estate*, 13 Mich. 44.

117. *In re Ticknor's Estate*, 13 Mich. 44.

118. *Hatheway v. Sackett*, 32 Mich. 97.

119. *Hatheway v. Sackett*, 32 Mich. 97.

120. *Hatheway v. Sackett*, 32 Mich. 97.

121. *Maynard v. Woodward*, 36 Mich. 423.

122. *Maynard v. Woodward*, 36 Mich. 423.

123. *Allen v. Duffie*, 43 Mich. 1, 38 Am. Rep. 139, 4 N. W. 427;

124. *Wheelock v. Am. Tract. Soc.*, 109 Mich. 141, 66 N. W. 955; *Cook v. Universalist General Convention*, 138 Mich. 157, 101 N. W. 217.

125. *Penny v. Croul*, 76 Mich. 471, 5 L. R. A. 858, 43 N. W. 649.

126. *Attorney General v. Soule*, 28 Mich. 153.

The Object of the Gift.

The objects of the gift as detailed in the definition may be various, but it is essential that the gift is certain as to its purpose^{120a}. Thus, a bequest is not uncertain where a sum of money was to be paid to a village to be used in the erection of a school building, to be used as a high school, and to be suitable for that purpose¹²⁷.

Libraries.

Public libraries are regarded as worthy objects for charitable devises, and bequests for that purpose are sustained by the courts¹²⁸.

Parks.

Bequests for the establishment of public parks and playgrounds for children are recognized by the courts to be valid, so is a devise made to a board of water commissioners for the purpose of beautifying the park surrounding the water works¹²⁹.

Doctrine of Cy Pres.

The doctrine of *Cy Pres* is founded upon the rule of construction that the intention of a testator, who seeks to create a charity, is to be given effect as far as is consistent with the rules of law. It modifies the strictness of the common law, as to a condition precedent to the enjoyment of a personal legacy, for when a literal compliance with the condition becomes impossible from unavoidable circumstances, and without default in the legatee, it is sufficient that the

127. *Hatheway v. Sackett*, 32 36 Mich. 423.
Mich. 97.

128. *Maynard v. Woodward*, 471, 5 L. R. A. 858, 43 N. W. 649.

129. *Penny v. Croul*, 76 Mich. 471, 5 L. R. A. 858, 43 N. W. 649.

condition is complied with as near as it practically can be¹³⁰. It has been said "that the cases in which the doctrine has been received have arisen on devises in which the testator has expressed himself in terms which have been thought by the courts to contain a clear indication of his intention that the devisee and his issue should take the lands, and an intimation of the mode of the issue's taking them; and his language in respect to the mode of the issue's taking them, has been thought by the courts to be such, as construed literally, imported limitations contrary to law. In construing these devises, the courts have considered the testator's primary object was that the issue of the devisee should take the land, and that the mode in which the issue should take it was the testator's secondary object; or, as it has been usually expressed, that the former was his general, the latter his particular intention. Then, in conformity to the uniform practice of effecting the intention of the testator as far as possible, they have thought themselves required to adopt that construction of the devise which, by including the issue of the devisee, satisfied the general intention of the testator that the issue should take, but which at the same time, by raising for the issue estates different from those which the testator appeared to have intended them, sacrificed to that extent his particular intention. Thus, where the testator has devised lands to a person and his issue, and has appeared to intend that all the issue of the devisee should take the lands, and, at the same time, has appeared to intend to devise estates by purchase, to the children of unborn children of the devisee, the courts have considered such limitations contrary to law; but, as the will

130. *Re Brown's Will*, 18 Ch. Div. 65.

has appeared to them to show an intention that the issue should take, and this intention could be effected by the issue's taking derivatively through the ancestor, the courts, rather than the intention of the testator should absolutely fail of effect, have put such a construction in the devise as vested the inheritance in the ancestor himself. Such a construction brings all the parties intended to be benefited by the testator, within the operation of the devise, and thus satisfies the general intention of the testator, but in respect to the mode in which the testator would be thought, by the literal meaning of his language, to intend they should take, this materially varied and thus his particular intention is sacrificed"¹³¹. Where a will is wholly void, the doctrine of *cy pres* cannot be applied to sustain it¹³².

131. Butler's note on Fearn.

132. *St. Amour v. Rivard*, 2 Mich. 294.

CHAPTER XIV.

ELECTION.

- §243. The Right in General.
- §244. The Statutory Right.
- §245. Common Law and Statutory Rule.
- §246. Dower in Relation to the Doctrine of Election.
- §247. Failure to File Notice of Election in Time.
- §248. Presumption as to "In Lieu of Dower" Under Statutory Rule.
- §249. Who May Exercise the Right.
- §250. Acts Constituting Election.
- §251. Taking Under Will.
- §252. Taking Against Will.
- §253. Void Will Not to be Rendered Valid by Election.
- §254. A Widow When Not Precluded.
- §255. Taking Under Will Not Entitled to Dower in Addition.
- §256. Second Wife's Interest in Will Providing for First Wife.
- §257. Abatement.

§243. The Right in General.

Election is the right to choose between two alternative rights or claims, or it is the obligation imposed upon a party to choose between two inconsistent or alternate rights or claims in cases where there is a clear intention of the person from whom he derives one of the rights that he should not enjoy both. The doctrine is clear that where an elective gift is the object of the testator's bounty, if the rights conferred are not inconsistent, no election can take place,¹ for the doctrine rests upon the equitable ground that no person will be permitted to claim inconsistent rights with regard to the same subject, and that any one who

1. *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228.

asserts an interest under a writing or document is bound to give full effect, as far as he can, to that writing or document, and it may be said that he who accepts a benefit under a deed or will must adopt the contents of the whole instrument; confessing to all its provisions and relinquishing every right inconsistent with it². Thus, where a fund is set aside by a testator for the use of his wife in that she could use the income as long as she chose or could demand a portion of the principal or the entire principal by giving three months' notice, either in writing or verbally, an election does not arise by which she must choose between the income and the principal³. An election may be expressed or implied. The question whether there has been election or not must be determined upon the circumstances in each particular case, for general principles are not available. The election may be inferred from the conduct of the party, his acts, omissions, and mode of dealing with the property. An election to take under a will may be inferred from unequivocal acts of ownership, with knowledge of the right to elect, and not through a mistake with respect to the condition and value of the estate⁴. The maxim has become established that no one is bound to elect who is ignorant of his rights. Thus, a person who is entitled to any benefit under a will or other writing, must, if he claims that benefit, abandon every right or interest, the assertion of which would defeat, in whole or in part, any of the provisions of the writing or document⁵. The presupposition of a plurality of gifts or rights

2. *Penn v. Guggenheimer*, 76 Va. 846.

3. *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228.

4. *Defreese v. Lake*, 109 Mich. 415, 32 L. R. A. 744, 63 Am. St. Rep. 584.

5. *In re Bloss' Estate*, 114 Mich. 204, 72 N. W. 148.

with an intention, express or implied, of the party who has a right to control one or both, is that one is to be substituted for the other. Thus the choice that a widow has between the statutory right of dower and a testamentary devise or bequest in lieu of dower, is an illustration of the right of election. It is manifest that the right of election may be generally regarded as a unit, if there is no provision in the will to the contrary, for a person can not elect to take both of the inconsistent rights, but must elect to take one of them, neither can he elect to take a portion under each right, for the doctrine of election and waiver is applicable to such rights which are given for the sole benefit of the one who possesses the right to elect.

§244. The Statutory Right.

The statute⁶ provides that all dispositions of personal property by last will and testament shall be subject to the following limitations and restrictions:

First. If the testator shall leave surviving him a wife, the testamentary dispositions shall be subject to the elections of such wife, to take any interest that may be given her, by the testator in his last will and testament; or in lieu thereof, to take the sum or share that would have passed to her, under the statute of distributions, had the testator died intestate, until the same shall amount to five thousand dollars, and of the residue of the estate one-half the sum or share that would have passed to her, under the statute of distributions, had the testator died intestate, and in case no provision be made for her in said will, she shall be entitled to the election aforesaid.

6. C. L. '97, §9300.

Second. If by any will, any special devise or bequest is made to the wife in lieu of any particular thing or any particular interest to which such wife might be entitled, in case of intestacy, the election by the wife to take the special devise or bequest, or the other particular thing or interest, in lieu of which it is given, shall not deprive the party electing, or any other person, of the right to leave the testamentary disposition of property in all other respects unaffected and unimpaired; and to have the benefit of any other provisions therein, the same as he or she would have had, if this act had not been passed. Again, the election to take otherwise than under the will in any contingency above contemplated, shall be made in writing, and filed in the court in which proceedings for the settlement of the estate are being taken, within one year from the probate of the will; and the failure to file such election within the time above provided shall be deemed an election to take under the will⁷. This statute cannot be so construed that the widow is permitted to make cross elections; that is, she may approve of the action of the testator in devising her the realty, and at the same time refuse the terms given by the testator as to personalty,—in other words, she is permitted to accept the terms of the will in one part, because more favorable, and refuse to be bound by the other, because against her interest⁸. In comparing the old statute with a later one, it was said that by the old law, if a widow elected to claim her dower, she lost, usually, all claim to personalty as well as realty devised or bequeathed. She was not entitled to waive any provision of the will without waiving all, unless the will itself so provided. This statute

7. C. L. '97, §9301.

8. *In re Bloss' Estate*, 114 Mich. 206, 72 N W. 148.

came in to enlarge her rights by enabling her to elect as to personalty as well as realty. But there is nothing in this statute which gives her the right to claim a bequest of personalty, and, at the same time, claim an interest by intestacy. If she claims a bequest of personalty, the will stands as to the other bequests. By the second clause of the statute it is provided that where she has an election between taking a specific thing and a bequest in lieu of it, such election shall not affect any other testamentary provision in favor of such party, or of any other person. Under the statute an election is a valid one when made for an incompetent widow by her guardian, with the consent of the probate court⁹, and the failure of a widow, who is incompetent, to file an election within the statutory year will not be deemed an assent on her part to take under the will¹⁰. Where a widow waived the provisions made for her in the will of the testator, and elected to take under statute, providing for the widow by giving in such cases, one-third of the net estate, until the sum shall amount to five thousand dollars, and in addition one-sixth of the residue of the estate, the residue was properly arrived at by deducting from the net estate, \$32,369.37, the sum of \$15,000, one-third of which passed to the widow under the first provision of the statute¹¹, leaving as such residue the sum of \$17,369.57, of which the widow was entitled to one-sixth¹². In a case where a widow claiming a legacy bequeathed to her by the will of her husband in lieu of dower and leaving the residue of his estate to his children, she is not entitled to share by intestacy in his personal estate¹³.

9. *In re Andrews' Estate*, 92 Mich. 449, See S. C. 87 Mich. 167.

10. *In re Andrews' Estate*, 92 Mich. 449.

11. C. L. '97, §9300.

12. *Phillips v. Phillips*, 91 Mich. 433, 51 N. W. 1071

13. *In re Estate of Smith*, 60

§245. Common Law and Statutory Rule.

In the event the testator fails to indicate expressly or impliedly whether the devise or bequest is given in addition to or lieu of dower, there arises the presumption under the common law that if the intention is not clearly derived from the will of the testator, the devise or bequest is to be in addition to dower. A married woman is not barred of her dower in lands whereof her husband was seized of an estate of inheritance during the marriage, and which he conveyed in his lifetime by deed in which she did not join, by reason of her having accepted the benefit of provisions made for her in the will of her husband¹⁴.

§246. Dower in Relation to the Doctrine of Election.

A surviving wife has certain rights given her by law in her husband's property, both real and personal, upon his decease, and likewise has the surviving husband certain rights given him by law in the wife's property upon her decease. The right of dower and the right of curtesy are such rights. Dower may be defined as the provision which the law makes for a widow out of the lands or tenements of her husband for her support and the nurture of her children¹⁵. At common law as well as by statute, dower is a life estate in one-third of the deceased husband's real estate, and has no reference to personal property¹⁶. Curtesy at common law rests upon four requisites which are necessary to create such tenancy, viz.: marriage, seizure by the wife, issue and death of the wife¹⁷, while under the

Mich. 136, 27 N. W. 80.

14. Westbrook v. Vanderburgh, 36 Mich. 30.

15. Seager v. McCabe, 92 Mich. 186, 16 L. R. A. 247, 52 N. W.

299.

16. Stearns v. Perrin, 130 Mich. 456, 90 N. W. 297.

17. Halton v. Lyon, 2 Mich. 93.

statute¹⁸ a tenancy by the curtesy may be created when any man and his wife shall be seized in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy, provided that if the wife, at her death shall leave issue by any former husband, to whom the estate might descend, such issue shall take the same, discharged from the right of the surviving husband to hold the same as tenant by the curtesy. Reference has been made solely to these rights for the purpose of showing their application to the doctrine of election. It is self-evident that where a devise or bequest is made in a will in lieu of dower or curtesy, full effect must be given to the intention of the testator, and the surviving spouse must elect either to take under the provisions established by law or under those made in the will¹⁹. Where the words "in lieu of dower" are added to a devise or bequest, it is clear that the intention of the testator is to make the surviving spouse elect²⁰. It has been said that a bequest to a wife made in lieu of dower is a legacy²¹ and on election to take the provision made under a will the widow becomes a creditor of the estate²². A married woman is not barred of her dower in lands which her husband owned at the time of his death. Neither is she barred, although she elects to take under the provisions in the will in lieu of her dower in lands of which he was seized during marriage, but conveyed without the wife joining in the conveyance²³.

18. C. L. '97, §8955.

19. *In re* Estate of Smith, 60 Mich. 136, 27 N. W. 80.

20. *Wake v. Wake*, 1 Ves. jr., 335.

21. *Wake v. Wake*, 1 Ves. jr.,

335.

22. *Tracy v. Murray*, 44 Mich. 109, 6 N. W. 109.

23. *Westbrook v. Vanderburgh*, 36 Mich. 30

§247. Failure to File Notice of Election in Time.

As a general rule, the notice of election must be filed within the time prescribed by law, but a failure of an incompetent widow to file such notice of election within the statutory year will not be deemed an assent on her part to take under the will, for an election made for an incompetent widow by her guardian, with the consent of the probate court, is valid. Under the statute²⁴ providing that the testamentary disposition of personal property by a husband shall be subject to the election of his wife to take the interest bequeathed to her, or, in lieu thereof, the share that would have passed to her under the statute of distributions if the husband had died intestate, subject to certain limitations as to amount, and that such election, if to take otherwise than under the will, shall be made in writing and filed in the court in which the estate is being settled, within one year from the probate of the will, and, if not so filed, that she shall be deemed to have elected to take under the will²⁵.

§248. Presumption as to "In Lieu of Dower" Under Statutory Rule.

The presumption is that the dower interest extends to all the lands the husband died seized of, and to any lands which he may have have been seized of during marriage, but which he conveyed without his wife joining in the conveyance²⁶.

24. C. L. '97 §§9300, 9301.

92 Mich. 449.

25. *In re* Estate of Andrews,

26. *Westbrook v. Vanderburgh*, 36 Mich. 30.

§249. Who May Exercise the Right.

The act of election is personal and must be exercised by the person in whom the right is vested. It is clearly manifest that the right of dower cannot be exercised after the death of the widow by her personal representatives or her heirs, even though the notice of election was prepared before her death, but not filed by her personal representative until after her death²⁷. However, in case of incompetency an election made for an incompetent widow by her guardian, with the consent of the probate court, as evidenced by an order entered for that purpose, is a valid contract²⁸. The court sustained the findings made by the probate judge, in that they were a sufficient record showing that the election filed by the guardian was made and filed with the knowledge and consent of the probate court, and that it had the same legal effect as if such record had been made at the time such election was filed²⁹.

§250. Acts Constituting Election.

Evidence of inconsistent acts may rebut the presumption that a widow has accepted a devise of a life estate in remainder under a will³⁰. An election made by a guardian for an incompetent widow with the consent of the probate court is valid³¹.

§251. Taking Under Will.

The acceptance is not completed by a release of dower

27. *In re Service's Estate*, 155 Mich. 179; *Church v. McLaren*, 85 Wis. 122.

28. *In re Estate of Andrews*, 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296.

29. *Bassett v. Judge of Pro-*

bate, 87 Mich. 167.

30. *Defreese v. Lake*, 109 Mich. 415, 52 L. R. A. 744, 63 Am. St. Rep. 584, 67 N. W. 505.

31. *In re Andrews' Estate*, 92 Mich. 449, 17 L. R. A. 296, 52 N. W. 743.

executed by the widow and by her assent being given to take the legacy. Its completion can only be effected when, after the death of her husband, the provisions of the will are accepted³². The fact that a widow gave her consent to abide by the provisions of the will does not preclude her from the right to share in the residuary clause which is declared invalid³³. It is clear that when a woman is provided for in her husband's will she has the right to elect whether she will take such provision or not—in other words, she shall elect either to take under the will or be endow-ered³⁴. In the event of insufficiency of assets the costs of a suit to establish the rights of a widow as to her acceptance of the provisions will be ordered paid out of the estate of the testator³⁵.

§252. Taking Against Will.

In a case where a widow takes against the will and the testator has left children surviving him, and the widow elects to take under the statute, she is entitled to one-third of the first amount of the net estate, and one-sixth of the residue after deducting the first amount of the said estate³⁶.

§253. Void Will Not to be Rendered Valid by Election.

A void will, which is mainly so on account of the provisions made for the wife, cannot be made valid by the wife electing to take under the statute³⁷.

32. *Tracy v. Murray*, 44 Mich. 109, 6 N. W. 224.

33. *State v. Holmes*, 115 Mich. 456, 73 N. W. 548.

34. *Stearns v. Perrin*, 130 Mich. 456, 90 N. W. 297.

35. *State v. Holmes*, 115 Mich. 456, 73 N. W. 548.

36. *Phillips v. Phillips*, 91 Mich. 433, 51 N. W. 1071.

37. *Dean v. Mumford*, 102 Mich. 570, 61 N. W. 7.

§254. A Widow When Not Precluded.

A wife, who accepts the provisions made in a will in lieu of dower, may enforce a claim against the testator's estate, and neither will a recital in a will preclude her from doing so³⁸.

§255. Taking Under Will Not Entitled to Dower in Addition.

A widow cannot accept the provisions under the will and claim dower in addition³⁹, neither can she claim anything additional which is not bequeathed⁴⁰. Although a testator has made provision for his widow under a will, a reasonable allowance, authorized by statute⁴¹ for her support and the support of the minor children, will be made pending the settlement of the estate⁴².

§256. Second Wife's Interest in Will Providing For First Wife.

The dower rights of the second wife in the testator's estate are the same as if he had died intestate where a husband during the life-time of his first wife made a will

38. *Taylor v. Taylor's Estate*, 138 Mich. 658, 101 N. W. 832.

39. *Miller v. Stepper*, 32 Mich. 194.

40. *In re Smith's Estate*, 60 Mich. 136, 27 N. W. 80.

41. C. L. '97, §9289. All the estate of the testator, real and personal, shall be liable to be disposed of for the payment of his debts, and the expenses of administering his estate, and the probate court may make such reasonable allowance as may be judged

necessary for the expenses of the maintenance of the widow and minor children, or either, constituting the family of the testator, out of his personal estate, or the income of his real estate, during the progress of the settlement of the estate, but never for a longer period than until their shares in the estate shall be assigned to them.

42. *Moore v. Moore*, 48 Mich. 271, 12 N. W. 180.

devising and bequeathing all his property, and after her death he remarried and died without changing his will, or in any way making provisions for his second wife⁴³.

§257. **Abatement.**

In a case where a widow elects to take under a general provision in lieu of dower and the assets are insufficient, the bequest is subject to abatement *pro rata* with the other pecuniary bequests⁴⁴.

43. Burrall v. Bender, 61 Mich. 608, 28 N. W. 731.

44. Tracy v. Murray, 44 Mich. 109, 6 N. W. 224.

CHAPTER XV.

THE RIGHTS OF DEVISEES AND LEGATEES.

- §258. Time of Accrual of Right to Devise or Legacy.
- §259. Payment of Legacies. Time Fixed by Will. Rule When Not Fixed.
- §260. Out of What Property or Fund Legacies to be Paid.
- §261. Interest on Legacies.
- §262. Acceptance and Renunciation.
- §263. Waiver, Abandonment and Forfeiture.
- §264. Title of Devisees and Legatees.
- §265. Election Between Proceeds and Bequest.
- §266. Possession of Property.
- §267. Support and Maintenance.
- §268. Transactions Between Devisees or Legatees.
- §269. Bequests to Creditors.
- §270. Rights of Creditors of Devisees and Legatees.
- §271. Actions by Devisees or Legatees.

§258. Time of Accrual of Right to Devise or Legacy.

The rule is well settled that, unless an intention appears to the contrary, the will shall operate from the death of the testator, and estates vest at that time¹. It is apparent that under this rule specific bequests vest at the death of the testator, and are not dependent upon any order of distribution or allotment by the probate court; the identical thing given is served from the bulk of the testator's property by the operation of the will from his death². Where one of the legatees had one child at the death of the testatrix, but shortly afterwards gave birth to another child, and the

1. Rood v. Hovey, 50 Mich. 284, Toms v. Williams, 41 Mich. 552, 2 N. W. 814; Eberts v. Eb-
erts, 42 Mich. 404, 4 N. W. 172.
2. Proctor v. Robinson, 35 Mich. 284.

first child died thereafter, followed by its mother, the second child was entitled to one-fifth of the estate without waiting until the youngest child of the testatrix arrived at the age of twenty-one³. In the event of a widow electing to take under the law, the rule is that the residue, after payment of the debts, expenses of administration and the portion due to the widow, should be distributed immediately to the legatees⁴.

§259. Payment of Legacies. Time Fixed by Will. Rule When Not Fixed.

If the time is fixed by the will when the legacy is payable, the legacy is payable at that time and it can be enforced, provided it does not violate the statute of perpetuity. A payment of a legacy on the demand of the legatee is valid⁵. The rule is well established at common law where the will does not fix the time of payment of the legacy, the time of payment is fixed at one year after the death of the testator, and where legacies are to be paid out of one of two funds, the will being ambiguous as to which one, the one available immediately is the fund out of which the legacies are to be paid⁶.

§260. Out of What Property or Fund Legacies to be Paid.

A general legacy where there are two funds charged for the education of children and the will is ambiguous the fund immediately available is to be utilized for the pur-

3. *In re* Schilling's Estate, 102 Mich. 612,

4. *In re* Schultz's Estate, 113 Mich. 592, 71 N. W. 1079.

5. *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228.

6. *Thurber v. Battey*, 105 Mich. 718, 61 N. W. 62.

pose⁷. Upon the failure of the personal property to pay the legacy, a demonstrative, not a specific legacy, was not chargeable in the real estate⁸. An annuity of fifty dollars is chargeable on the entire personalty where it was to be paid monthly out of any money which might come into the hands of the executors by their right as executors⁹.

§261. Interest on Legacies.

The rule is well settled that interest does not begin to accrue on a general legacy until the expiration of one year after the issuance of letters testamentary¹⁰, and the fact that an executor filed a bond as residuary legatee makes no difference¹¹. Interest was properly allowed where a devisee defaulted in payment of annuities¹².

§262. Acceptance and Renunciation.

As may be said, the proposition is almost self-evident that a legatee has no interest in the legacy during the lifetime of the testator, but upon the death of the testator an estate vests under a devise or legacy in the devisee or legatee. However, the devisee or legatee is not bound to accept a devise or legacy *nolens volens*. It is only an heir at law who, by the common law, becomes the owner of land without his own agency or assent. The devisee or legatee can choose between either one of two ways as to the legacy left him in that he may accept or renounce the

7. *Thurber v. Battey*, 105 Mich. 718, 63 N. W. 995.

8. *Hibler v. Hibler*, 104 Mich. 274, 62 N. W. 361.

9. *Langrick v. Gospel*, 48 Mich. 185, 12 N. W. 38.

10. *Wheeler v. Hatheway*, 54

Mich. 547, 20 N. W. 579.

11. *Wheeler v. Hatheway*, 54 Mich. 547, 20 N. W. 579.

12. *Stringer v. Steven's Estate*, 146 Mich. 181, 8 L. R. A. (N. S.) 393, 117 Am. St. Rep. 620, 109 N. W. 269.

gift or disposition made to him. There are two classes of cases in which it may become necessary to determine what constitutes a renunciation or acceptance: (1) Cases where the devisee or his privies deny renunciation, and (2) where they assert it. In the former (i. e., before the devisee can be deprived of the estate), there are cases that hold that renunciation is not to be lightly inferred, and that equivocal acts will not do. In general it may be said that an estate cannot be forced upon a man, but it is manifest that a devise is *prima facie* for the benefit of the devisee and he is supposed to assent to it, until he does some act to show his dissent. The presumption in law is that he will assent until the contrary is proved the assent to the devisee was never given by him, and consequently the estate never was vested in him. The most satisfactory evidence of acceptance is by entry and acceptance under the will, but a renunciation and act inconsistent with acceptance may be effected by deed. The fact that a devisee of a life estate in remainder claimed title in fee to the premises devised by virtue of tax deeds for taxes assessed against the land during the occupancy of the first devisee, that he had such deeds recorded, that he took possession of the premises after death of the first tenant, and that he occupied the same for two years and then conveyed by warranty deed, constitutes a renunciation, at least, the question is sufficient to go to the jury¹³.

§263. Waiver, Abandonment and Forfeiture.

A waiver of a legacy does not obtain when a widow, entitled to the income of the estate, did not make claim to

13. Defreese v. Lake, 109 Mich. 415, 32 L. R. A. 744, 63 Am. St. Rep. 584, 67 N. W. 505.

the income until after the approval of the accounts of the executor for the order approving the account only showed the payment of the sum intended for that purpose to the trustee¹⁴. A legatee forfeited his legacy where the testator, after giving his wife a life estate, gave his nephew, who was living with him, a legacy of a certain sum, "if the said (nephew) shall continue to live with my family and in my estate until he shall arrive at the age of twenty-one years," but before coming of age, he left the family of his aunt after being urged not to do so and warned that, if he did so he would forfeit his legacy; and in making claim for his legacy he did not file his petition until twenty-five years after he became of age¹⁵.

§264. Title of Devisees and Legatees.

The general rule may be stated that a devisee can take no greater interest or rights in land devised than the devisee had, nor is he a *bona fide* purchaser for a valuable consideration¹⁶. The fact that one is given by will a residuary interest in personalty of the testator makes him nevertheless a legatee and he takes title to the bequests as such for the reason that the same clause of the will gives him a like interest in the realty¹⁷. A daughter cannot maintain ejectment against the grantees of devisees where the owner of lands has devised an undivided interest in the same in fee to his wife with a provision that his daughter should have her maintenance out of the same, and the wife subsequently devised the same in fee to other daughters, sub-

14. Dickenson v. Henderson, Mich. 177, 50 N. W. 143.
122 Mich. 583, 81 N. W. 583.

15. Pearl v. Lockwood, 123 Mich. 473, 66 N. W. 350, 32 L. R. A. 352.

16. Ribley v. Seligman, 88

ject to the support of the daughter first mentioned, the latter takes no legal interest in the lands or title to the possession¹⁸.

§265. Election Between Proceeds and Bequest.

The rule is that where a bare power of sale is given to executors for the purpose of selling lands in order to pay over the proceeds to devisees whose right and title under the will is absolute and vested, the devisees may elect to take the land devised instead of the proceeds before the sale is made¹⁹.

§266. Possession of Property.

A devisee may take his estate as of the death of the testator, except as otherwise provided by statute²⁰, for the statute²¹ providing that no will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court, furnishes the means to establish by a peculiar kind of record-evidence the validity of an existing right; and it is well settled that for every valuable purpose touching the existence and transfer of title the probate is retroactive, and has the same effect as if it had been had at the time of the death of the testator. Where there is no deficiency of assets an executor cannot withhold his assent to the legatee's immediate possession of specific bequests, neither can they be withheld

18. *Donihue v. Rankin*, 31 N. W. 893.
Mich. 148.

19. *Bennett v. Chapin*, 77 Mich. 444, 7 N. W. 54.

Mich. 526, 7 L. R. A. 377, 43 21. C. L. '97 §9281.

20. *Richards v. Pierce*, 44

where they are needed for household or husbandry purposes²². Possession should be given immediately to the legatee²³. In the event the land is not taken by the executors for the purpose of administration a residuary legatee of lands, although holding title subject to the antecedent legacies, may have and defend possession from the time the will is probated²⁴. The widow was entitled to the possession and management of the fund represented by the mortgage in a case where among the assets was a mortgage which it was agreed should be considered as money²⁵, so the widow was entitled to possession and control of all the property where the will of the testator appointed a trust company his "executor," and gave his wife "All the use and income" of his entire estate for life or until marriage²⁶.

§267. Support and Maintenance.

Provisions in wills relating to maintenance and support must be so construed as to effectuate the real intent for

22. *Eberstein v. Camp*, 37 Mich. 176.

23. *Eberstein v. Camp*, 37 Mich. 176.

24. *Chapman v. Craig*, 37 Mich. 370.

25. *Patterson v. Stewart*, 38 Mich. 402.

26. *Michigan Trust Co. v. Hertzog*, 133 Mich. 513, 95 N. W. 531. See *Schohr v. Lock*, 84 Mich. 263, 47 N. W. 445, where testator intended to give the wife only the use of the property, and not the possession and control of the property. In *Spiers v. Roberts* 73 Mich. 666, 41 N. W. 841, the widow was entitled to the posses-

sion of the fund as against the subsequently appointed guardian. See also *Hull v. Hull*, 122 Mich. 338, 81 N. W. 89.

As to accumulations, rents, profits and income: See *Pray v. Ralber*, 144 Mich. 208, 107 N. W. 1076, where the intention of the testator was to divide the income equally among all his children, subject to be used as necessity demands, judged by the standard of the testator's method of using it if he had been living.

As to annuities: See *Roehm v. Clark's Estate*, 104 Mich. 1, 61 N. W. 882; *State v. Dunbar's Estate*, 99 Mich. 99, 57 N. W. 1103.

which the provision was made. Thus, an estate was liable for care, nursing and medical aid of a daughter, who died a minor, where the will of the testatrix made provisions for support of the daughter²⁷, but the obligations to support children, who are legatees under the will, is suspended, when they leave the household of the devisee²⁸, and where the education is left to the devisee and it was very meagre which the children received, an accounting cannot be had on those grounds²⁹. The circuit court has jurisdiction to provide for the support and education of children, who are in destitute circumstances, when legacies to minor children are contingent upon the legatees arriving of age³⁰, and the necessities of the family, for which provision must first be made, must be given heed before the legacies, which must yield to them³¹.

§268. Transactions Between Devisees or Legatees.

In general it may be said that it is entirely competent for legatees to agree to any division of special legacies bequeathed to them, they may see fit to make, and no heir or residuary legatee can complain³². An agreement between the legatees is valid in the absence of undue influence, for the legatees are not deprived of any rights given under the will³³. In a case where a testatrix made bequests, among others, to the children of several of her deceased brothers and sisters and the legatee under the

27. *Plant v. Weeks*, 39 Mich. 117.

28. *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385.

29. *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385.

30. *Knorr v. Millard*, 57 Mich. 205, 23 N. W. 807.

31. *Roehm v. Clark's Estate*, 104 Mich. 1, 94 N. W. 882; See *Cole v. Cole's Estate*, 125 Mich. 655, 85 N. W. 113.

32. *Wilkins v. Hukill*, 115 Mich. 594, 73 N. W. 898.

33. *Hull v. Hull*, 149 Mich. 500, 112 N. W. 1126.

will entered into an agreement by which the property was divided and the children were described as heirs of the deceased brother and sister, the word was merely descriptive and therefore did not convey any rights to the parties as heirs at law of the testatrix³⁴. The settlement of the family relations was adjusted, in the absence of fraud, where certain heirs and devisees entered into an agreement to distribute the estate in full upon certain terms³⁵. It may be said that an agreement made by residuary legatees under a will is void for want of consideration, in the absence of fraud or mistake in making a settlement, where the proceeds derived from an insurance policy—not disposed of by will—should be paid to the mother of the legatees, who was the widow of the testator, and the agreement was made after a complete settlement in which the rights of all the parties to the estate were fixed without affecting their rights to the policy³⁶. On the other hand the agreement was supported by a sufficient consideration where made by way of adjustment of frauds or mistake in settlement³⁷. It is entirely competent for mother and son who are both executors and legatees to will the mortgage as a legacy instead of including it in the assets, and their possible liability to be called on to contribute as legatees in the event of failure of assets would not prevent their lawful retention of the note and mortgage to where a mortgage was given by will to the widow of the testator for life and the remainder over to his son, and the two were appointed execu-

34. *Wilkins v. Hukill*, 115 Mich. 594, 73 N. W. 898.

35. *Sheley v. Brooks*, 114 Mich. 11, 72 N. W. 37.

36. *Sheley v. Brooks*, 114 Mich. 11, 72 N. W. 37.

37. *Sheley v. Brooks*, 114 Mich. 11, 72 N. W. 37.

tors³⁸. Where a will was conditioned on the payment of the debt of the testator by two legatees and one of them agreed with the other to pay his share according to the amount of the indebtedness as found by the probate judge the party so agreeing could not charge the other with a payment which he had made before such finding if he had never filed a claim for its amount against the estate for allowance; and the finding of the probate court would be conclusive under the agreement, as to the amount due from each³⁹. The life estate merges in the fee where a devise to a widow of a life estate becomes vested in the owners of the fee⁴⁰.

§269. Bequests to Creditors.

The acceptance of benefits under a will cancels the claim of the devisee or legatee⁴¹.

§270. Rights of Creditors of Devisees and Legatees.

It is consonant with the principles of equity that where a legatee was heavily indebted to the estate of the testator and his estate was also heavily in debt, the proofs showing apparently insolvency, and a bill having been filed to subject the interest of a judgment debtor as a legatee under a will of the testator, the bill should be retained until final settlement of the estate, to the end that, if it shall appear on such settlement that there is anything due the legatee,

38. *Proctor v. Robinson*, 35 Mich. 284.

39. *Dennis v. Sharer*, 56 Mich. 224, 22 N. W. 879.

40. *Ryder v. Flanders*, 30 Mich. 336. See following cases

relating to the general subject; *Garman v. Hawley*, 132 Mich. 321, 93 N. W. 871, *Hovey v. Mills*, 98 Mich. 374, 57 N. W. 255; *Chapman v. Craig*, 37 Mich. 370.

41. *Rubert v. Rubert*, 126 Mich. 589, 85 N. W. 1118.

the creditor may be in position to move for the proper decree⁴². In a case where a testator devised lands as follows: "Unto the heirs of my son that his wife has by him, or may have by him hereafter;" with a further provision that "my son shall have his support and living out of the estate that I have hereby given to his children so long as he shall live," a life estate was not created for the son, but the land vested in his children, and the crops grown thereon were not subject to the son's debts⁴³.

§271. Actions by Devisees or Legatees.

An action of ejectment may be brought before probate of the will by a devisee for real property devised to him⁴⁴, where an executor was entrusted with the duty of keeping a legacy for a minor heir until she was of age and paid it over during her minority to her guardian, the legatee ought to have brought action against the executor and not against the guardian upon his bond for the same, for the executor still remained liable, and the guardian had no business with the money⁴⁵.

42. *Morgan v. Kingman*, 123 Mich. 197, 871 N. W. 1089.

43. *Rose v. Eaton*, 77 Mich. 247, 43 N. W. 972.

44. *Richards v. Pierce*, 44

Mich. 444, 7 N. W. 54.

45. *Hinckley v. Washtenaw Probate Judge*, 45 Mich. 345, 7 N. W. 907.

CHAPTER XVI.

CONSTRUCTION.

- §273. Interpretation and Construction.
- §274. Favorable Construction of Wills.
- §275. Precedents.
- §276. Intention of the Testator.
- §277. How the Intention is Ascertained.
- §278. How the Intention is Ascertained From the Words of the Will.
- §279. How Intention to be Ascertained From Situation and Circumstances.
- §280. How to Ascertain General or Particular Intention.
- §281. Effect Given to Intention.
- §282. Language of Instrument.
- §283. Construction in Favor of Instrument.
- §284. Time From Which the Will Speaks.
- §285. The Rule in Shelley's Case Abolished.
- §286. Restraints Upon Alienation.
- §287. Construction as to Time When Estate Vests.
- §288. General Rule as to Construction of Legacies.
- §289. Bequests on Condition.
- §290. General Residuary Bequests.
- §291. Repugnant and Contradictory Clauses.
- §292. Construction as to Partial Invalidity.
- §293. What Law Governs.

The preliminary questions associated with every last will and testament are:

First, was the testator at the time of making the will of full age?

Second, was he of sound mind and memory?

Third, was he under no restraint?

Fourth, was the will executed with all the formalities required by law?

Fifth, was it subsequently revoked?

Sixth, was it properly admitted to probate?

In the event that all these questions are properly answered in the affirmative the will becomes a guide for the disposition of the property of the testator. The questions which are likely to arise, if the intentions of the testator are not clear, are:

First, what is the intention of the testator?

Second, what does he mean by certain words, phrases, or clauses?

Third, what kind of an estate does he intend to create?

Fourth, has the statute of perpetuity been violated?

Thus we arrive at the rules of the construction of wills.

§273. Interpretation and Construction.

Interpretation may be defined as the act of finding out the true sense in which a word or any form of words is used. In other words it is the act of determining by the word or any form of words the sense or meaning the author of them intended to convey for the purpose of enabling others to derive the same meaning and idea; while ordinarily the words construction and interpretation are synonymous, yet the latter precedes the former but does not extend beyond the written text. Thus interpretation relies wholly upon the internal textual structure, while construction relies upon not only the internal textual structure, but upon extraneous circumstances and facts which may throw light upon the author's intentions so as to make the context of the document clear. It is clear that where the language is plain and transparent there is no room for the office of construction. The construction of a will at times is extremely difficult for the reason that its language is lacking in precision and its poverty of expression, arising from the in-

adequate knowledge of the law applicable to dispositions on the part of the testator at the time of the execution of the will is perplexing. In making a construction of a difficult legacy or devise in a will, it is essential that the whole scheme of the will be thoroughly comprehended for the ultimate purpose of establishing the object for which the legacy or devise was made. It is the office of construction to discover such object upon the application of principles of law to the legacy or devise in question.

§274. Favorable Construction of Wills.

A disposition had manifested itself from an early period on the part of the courts to give a more favorable construction to wills than to ordinary legal documents. This peculiar indulgence extended to testators had its foundation in the fact that they were regarded as *inopes consilii*, and the language they employed in drawing up wills was free from technical restraint, for they were not sufficiently familiar with certain forms of expression such as "heirs," "heirs-at-law," "heirs of the body," "without issue," "without having or leaving issue," and others by which estates are created, so that the courts adopted a rule of construction by which generally the first donee was given an estate of inheritance. This freedom in the use of language had its limits, for there were points that had been ascertained and settled by rules sufficiently definite to establish precedents. Nevertheless there are "very few classes of cases," said Justice Miller, "more frequent or more perplexing in the courts than the construction of wills. If rules of construction, laid down by the courts of the highest character, or the authority of adjudged cases, could meet

and solve these difficulties, there would remain no cause of complaint on that subject, for such is the number and variety of these opinions that every form of expression would seem to be met. Unfortunately, however, these authorities are often conflicting, or arise out of the forms of expression so nearly alike, yet varying in such minute shades of meaning, and are decided on facts and circumstances differing in points, the pertinency of which are so difficult in their application to other cases, that the mind is bewildered and in danger of being misled. To these considerations it is to be added that of all legal instruments, wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law but of the correct use of the language in which it is written. Under this state of the science of the law, as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of much assistance, than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself."

§275. **Precedents.**

Precedents in will cases are not followed so arbitrarily as in other branches of the law, although judges submit to be bound by precedents and authorities on points, i. e., an effort is made to collect the intention upon grounds of a judicial nature. It is the policy of the courts to implicitly obey the

intention of testators, when ascertained, however informal the language may be in which it is clothed. Courts make application of certain established rules of construction¹ by which is prescribed the method of proceeding to ascertain the intention of the testator and by which, particular words and expressions have been given a definite meaning—a

1. It was deemed advisable to set forth in a concise form all the rules of construction relating to wills, as formulated by Mr. Jarman in his great work on wills, so that their nature and character may be readily determined.

I. That a will of real estate, wheresoever made, and in whatever language written, is construed according to the laws of the country, in which the property is situate; but a will of personalty is governed by the *lex domicilii*.

II. That technical words are not very necessary to give effect to any species of disposition in a will.

III. That the construction of a will is the same at law and in equity; the jurisdiction of each being governed by the nature of the subject, though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other.

IV. That a will speaks, for some purposes, from the period of execution, and for others from the death of the testator; but never operates until the latter period.

V. That the heir is not to be disinherited without an express devise, or necessary implication; such implication importing not natural necessity,

but so strong a probability, that an intention to the contrary cannot be supposed.

VI. That merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other definite object.

VII. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcilable, the latter must prevail.

VIII. That intrinsic evidence is not admissible to alter, detract from, or add to, the terms of the will, though it may be used to rebut a resulting text attaching to a legal title created by it, or to remove a latent ambiguity (arising from words equally descriptive of two or more objects or objects of gift).

IX. Nor to vary the meaning of words, and therefore to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible.

X. Courts will look at the circumstances under which the doctor makes his will, as the state of his property.

XI. That in general, implication is admissible only in the

meaning which does not always correspond with their popular acceptance. The inference is permissible that rules of construction may partake of the nature of adjective law in that they prescribe the method by which the intention of the instrument is ascertained, while, as they become transformed into fixed rules of property they partake of the nature of substantive law and become a precedent for all cases precisely analogous or identical. Thus a degree of

absence of, and not to control, an express disposition.

XII. That an express and positive devise cannot be controlled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will, and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents, though recourse may be had to such reference to assist the construction, in case of ambiguity, or doubt.

XIII. That the inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous; nor is the fact that the testator did not foresee all the consequences of his disposition a reason for varying it; but, where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose.

XIV. That the rules of construction cannot be strained to bring a devise within the rules of law; but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid.

XV. That favor or disfavor to the object ought not to influence the construction.

XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected and that other can be ascertained; and they are in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy.

XVII. That, where a testator used technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary.

XVIII. That words, occurring more than once in a will, shall be presumed to be used always in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject. And on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning.

XIX. That words and limitations may be transposed, supplied,

certainly has been attained by which the facts and circumstances in a certain class of cases may be settled by precedents, while others, however, closely they may resemble or be analogous to other cases, they cannot be determined by precedents. The rule is universal and well settled that the whole will is to be taken together, so as to give effect, if it be possible, to the whole; and cases in the form of precedents are of little value to the courts unless they substantially agree in their facts with the case under consideration, —a circumstance of rare occurrence. Extraneous circumstances are sometimes proper for consideration².

or rejected, where warranted by the immediate context, or the general scheme of the will; but not merely in a conjectural hypothesis of the testator's intention, however reasonable in opposition to the plain and obvious sense of the language of the instrument.

XX. That words, which it is obvious are mis-written (as dying with issue, for dying *without* issue), may be corrected.

XXI. That the construction is not to be varied by events subsequent to the execution; but the courts, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called upon to affix a significance to them.

XXII. That several independent devises, not grammatically connected, or united by the ex-

pression of a common purpose must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intentions in regard to both. There must be an apparent design to correct them.

XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible.

XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and, accordingly, a provision for the death of devisees will not be considered as intended to provide exclusively for its lapse, if it admits of any other construction.

2. *Thurber v. Battey*, 105 Mich. 718, 63 N.W. 995.

§276. Intention of the Testator.

"The intent of the testator is the cardinal rule in the construction of wills, and, if that intention can be clearly conceived, and is not contrary to some positive rule of law, it must prevail³." In other words a will should be interpreted and construed in accordance with the intention of the testator as expressed in or implied from the language used by him. It is the substance and not the form which must be considered in construing wills⁴. In a case where the subject matter of a devise in a will had been omitted, the devise was not one for interpretation but one for construction, because there was nothing on which the power could be exercised; and as there was no subject-matter to be construed or interpreted, there was no call for intrinsic facts to aid the office of interpretation or construction. In other words the devise is a complete blank and in regard to the property the will is dumb. In this devise there was nothing whatever on the face of the instrument to denote what real estate the testator had in view, nor anything to incline the intention one way rather than another in search of it⁵. Thus the primary object in the construction of a will is to ascertain, if possible, from the context of the will, the intentions of the testator⁶.

§277. How the Intention is Ascertained.

The general rule is that the intention must be collected from the whole will, founded on the writing itself⁷, for to

3. Chief Justice Marshall in *Finlay v. King*, 3 Pet. (U. S.) 346; *Foster v. Stevens*, 146 Mich. 131, 109 N. W. 265.

4. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

5. *Crooks v. Whitford*, 47 Mich. 283, 11 N. W. 159.

6. *Gregory v. Thompson*, 132 Mich. 205, 93 N. W. 245.

7. That the intention of a tes-

determine the intention it is natural that we must look to the will in order to give it effect—according to its intent, as far as that can be lawfully done⁸. It is manifest that the will is to carry out the intention of the testator⁹, but the intention must not contravene any positive rules of law¹⁰.

A codicil is always looked upon as a part of the will, and the intent is to be gathered from the whole, i. e., both from the will and codicil^{10a}. There is no question that since the statute of wills as well as before, a will may be construed in connection with another instrument in writing to which it refers. “An extraneous unsigned writing,” said the court, “may, by force of a clearly expressed intention in the body of the will, constitute part of the will itself. The reference in the will must be complete and unambiguous. It cannot be aided by extrinsic proof, but the identification of the writing referred to may be the subject of extrinsic parol testimony¹¹.” In order to understand the language of the testator Mr. Justice North said, “I must put myself in his position, and look at the surrounding circumstances.”

§278. How the Intention is Ascertained From the Words of the Will.

“All words,” said Lord Bacon, “whether they be in deeds

tator is to be collected from the whole of the will, *ex visceribus testamenti* is manifest so as to leave the mind quite satisfied about what the testator meant. Ireland v. Parmenter, 48 Mich. 631, 42 N. W. 883; Tewkesbury v. French, 44 Mich. 100, 6 N. W. 218; Thurber v. Battey, 105 Mich. 718, 63 N. W. 995.

8. Jameson et al., appellants,

etc., 1 Mich. 99; Jones v. Jones, 25 Mich. 401; Kinney v. Kinney, 34 Mich. 524; Toms v. Williams, 41 Mich. 565.

9. Cummings v. Corey, 58 Mich. 494, 25 N. W. 481.

10. Tracy v. Murray, 49 Mich. 35, 12 N. W. 900.

10a. Dexter v. Gordon, 136 Mich. 235, 98 N. W. 1016.

11. *In re* Blake Appeal, 117

or statute or otherwise, if they be general, and not express and precise, shall be restrained into the fitness of the matter and the person." The rule is universal that general words are interpreted in their usual sense, and they are strengthened by exceptions and weakened by enumeration, and it is clear that in order to avoid an obvious absurdity or inconsistency with the declared intention of the testator as gathered from the whole instrument, the ordinary and grammatical sense of the words employed may be modified, extended, or abridged to that extent, but no further, for no construction can be implied which is in conflict with the intentions of the testator as expressed in his will. In construing a will the general intent, if it can be gathered from the whole instrument, will govern; and neither the usual sense of technical language nor the order of clauses, will be allowed to disappoint the apparent and real purpose of the testator¹², for the general corollary is that technical words and expressions must be taken in their technical sense, unless a clear intention can be collected to use them in another sense. It is said that in all cases where a difficulty arises in applying words of a will or deed to the subject-matter of a devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the productions of further evidence upon the same subject calculated to explain what was the estate or subject-matter really intended to be granted or devised¹³. The intention of the testator which can be collected with reasonable certainty from the entire

Pa. St. 301.

12. Jones v. Jones, 25 Mich. 401; Tewkesbury v. French, 44 Mich. 103; Toms v. Williams, 41 Mich. 552; Kelly v. Reynolds, 39

Mich. 464; Goodell v. Hebbard, 32 Mich. 47; Jamison's Appeal, 1 Mich. 99.

13. Miller v. Travers, 8 Bing. 244.

will with the aid of extrinsic evidence of a kind properly admissible must have effect given to it beyond, and even against the literal sense of particular words and expressions, and when the intention is legitimately proved, it is competent not only to determine and settle the meaning of ambiguous words, but to control the sense, even if clear and to supply the place with express words in case of difficulty and ambiguity. There are two ways in which a latent ambiguity may be removed by extrinsic evidence. The first may arise either when it names a person or the subject of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description. The second may arise when the will contains a misdescription of the object or subject as where there is no such person or thing in existence, the person is not the one intended, or the thing does not belong to the testator¹⁴. In conclusion it may be said that in the construction of a will, the intention should be gathered from the four corners of the instrument¹⁵, and the intention must govern¹⁶, provided the ambiguity is not irreconcilable¹⁷.

§279. How Intention to be Ascertained From Situation and Circumstances.

The general rule in cases of this kind is to collect the intention of the testator from the words which he has used in his will, and not from conjecture, for it cannot be de-

14. *Kinney v. Kinney*, 34 Mich. 250.

15. *Wales v. Templeton*, 83 Mich. 177, 47 N. W. 238; *Stebbins v. Stebbins*, 86 Mich. 474, 49 N. W. 294; *Kinney v. Kinney*,

34 Mich. 250; *Jones v. Jones*, 25 Mich. 401.

16. *Wales v. Templeton*, 83 Mich. 177, 47 N. W. 238.

17. *Wheeler v. Wood*, 104 Mich. 414, 62 N. W. 577.

duced from the testator's circumstances in which a different intent would manifest itself than was plainly expressed in the will¹⁸. "There are cases in which," said Justice Cooley¹⁹, "When a man's will is examined in the light afforded by his property and by a knowledge of the persons who were or who may have been the objects of his bounty, some ambiguity may appear which can only be solved by recourse to parol evidence in aid of the construction. Language may be employed which seems to point with more or less directness to two different persons as the intended beneficiary, or a description of property may seem to fit one parcel as well as another. In such cases the testator must be supposed to have had only one of the persons or one of the parcels of property in mind in making the intended gift. And it is always admissible to ascertain which of the two he intended to indicate by a resort to any evidence which will give us an insight into his purpose. When an ambiguity is not found in the will itself, but is made to appear by intrinsic evidence, a resort to other evidence of a similar character, in order to solve the difficulty, is only pushing a little farther the inquiry by which the existence of an apparent uncertainty has been disclosed. Such ambiguities often appear when the will has been expressed with great care and caution; the difficulty arising from the fact that a name or description of one person or thing only in mind, may be found capable of being applied to others. There is no reason for defeating a gift by will for such an ambiguity that would not apply with equal force to a deed or a bill of sale. Indeed, parol evidence is

18. *Kinney v. Kinney*, 34 Mich. 250.

19. *Kinney v. Kinney*, 34 Mich. 250.

usually necessary to apply any gift or sale to the person or thing intended."

§280. How to Ascertain General or Particular Intention.

A general intent as deduced from the language of the will as a whole may be at variance with a particular intent expressed in some provision or clause, for it is clear that unless it appears to have been the intention of the testator as gathered from the whole will, a gift by words of general description is not to be limited by a subsequent attempt at a particular description²⁰.

§281. Effect Given to Intention.

The doctrine of approximation, or as it is generally called, the *cy pres* doctrine, cannot be applied in support of a will, where a testator provided in the will that each disposal of real estate made by it should only be for the use and benefit of the persons in whose favor it was made, his or her *life lasting*; that no parcel of the real estate should be sold or alienated in any manner; but, after the decease of these several parties to whom shares or parcels of the estate were given, these shares should remain for the use and benefit of the descendants of him or her to whom a share had been given, *their lives lasting, and so on*, and in case of demise without posterity, the particular share should accrue to the use and benefit of the owners being of the testator's relation or descendants, *their lives lasting*, of the testator's relation or descendants, *their lives lasting*, and so on, as long as the testator's posterity should exist, and

20. *Wales v. Templeton*, 83 Mich. 177, 47 N. W. 23.

in case of extinction to the next heirs,—there being no general intention of the testator, not conflicting with the law, which the court could sustain by sacrificing the particular intention of the testator²¹.

§282. Language of Instrument.

Substance rather than form must be regarded in construing wills²², and the terms used in wills are generally to be construed as bearing the meaning which has become generally accepted, but they are also, to be construed in connection with the rest of the will²³, for in general the language in a will creating rights should be construed according to its ordinary and commonly accepted meaning²⁴. The word "heirs," though technical, may also be understood, when used in common speech or in wills, to mean those who come in any manner to the ownership of any species of property by reason of the death of the owner²⁵. It is well settled that general words in a will may be restrained in their meaning, or entirely rejected, to carry out the intention of the testator, and it is not infrequent that they may be controlled by the particular words which follow²⁶. The term "settlement" in a will, providing that if testator's wife dies before settlement of his estate, certain money shall go into the residue, means that stage of proceedings when the debts and legacies are paid and nothing remains to be done but to distribute the residue²⁷. Again, unless the context re-

21. *Amour v. Rivard*, 2 Mich. 294.

22. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

23. *Porter v. Porter*, 50 Mich. 450, 15 N. W. 550.

24. *Rivenett v. Bourguin*, 53

Mich. 10, 18 N. W. 537.

25. *Hascall v. Cox*, 49 Mich. 435, 13 N. W. 807.

26. *Appeal of Jameson*, 1 Mich. 99.

27. *Calkins v. Smith's Estate*, 41 Mich. 400, 1 N. W. 1048.

quires a will, disposing of real and personal property in the same terms to be differently construed, the language of the testator cannot receive one construction for one class of property and another for the other²⁸.

§283. Construction in Favor of Instrument.

The general rule is that that construction is to be given to the instrument which will give it effect, for courts cannot inquire into the propriety of any disposition which a testator sees fit to make of his property by a legally executed will so long as it is not unlawful; nor can they adopt astute constructions to defeat provisions claimed to be unjust²⁹. It is clear that a will should be sustained where a devise in a will suspended the power of alienation in a manner not based on lives and where the devise can be eliminated without affecting the general plan and primary purpose of the testator³⁰. The presumption arises that, where two inconsistent clauses, provisions or parts of a will are manifest, in which one is consistent with the law and the other not, the testator intended to comply with the law, and that provision so construed by the court will be adopted³¹.

It is manifest that the presumption that a testator means to die intestate as to a part of his estate will not be raised where the will does not naturally lead to that inference³². There being no descendants, where a will disposed of a realty after the decease of the wife of the testator, but made no express directions concerning its disposal during

28. Ireland v. Parmenter, 48 Mich. 631, 12 N. W. 883.

29. Toms v. Williams, 41 Mich. 552, 2 N. W. 814.

30. Van Driele v. Kotvis, 135

Mich. 181, 97 N. W. 700.

31. Foster v. Stevens, 146 Mich. 131, 109 N. W. 205.

32. Bailey v. Bailey, 25 Mich. 185; Foster v. Stevens, 146 Mich. 131, 109 N. W. 265.

her life, in accordance with the presumption against intestacy, an implication might arise by which the life estate passed to the wife of the testator³³. Thus, if it can be reasonably avoided, no part of an estate of a testator should be treated as intestate³⁴, and it follows that the kind of construction to be adopted by the courts should be one by which every clause, provision, devise and legacy of a will should be sustained and given full effect, provided that such construction will not violate the general scheme of the will and that none of the provisions, devises or legacies are contrary to positive rules of law³⁵. The construction of a will is to be in favor of just, natural and reasonable disposition³⁶. It is also to conform with the distribution as nearly as the language will permit to the general rule of inheritance; and equities are regarded rather than technicalities³⁷. An equal distribution should be favored in the construction of a will where there is an ambiguity as to the shares devised³⁸. A question relating to intestacy as to property purporting to be disposed of by will is one for the court and cannot be settled by the submission of parties³⁹. Neither is the construction of a will to be varied by events subsequent to its execution⁴⁰.

§284. Time From Which the Will Speaks.

In general, wills operate from the death of the tes-

33. *Langrick v. Gospel*, 48 Mich. 185, 12 N. W. 38.

34. *Mann v. Hyde*, 71 Mich. 278, 29 N. W. 78.

35. *Foster v. Stevens*, 146 Mich. 131, 109 N. W. 265; *Gregory v. Tompkins*, 132 Mich. 205, 93 N. W. 245.

36. *Kinney v. Kinney*, 34 Mich.

250.

37. *Rivenett v. Bourquin*, 53 Mich. 10, 18 N. W. 537.

38. *Southgate v. Karp*, 154 Mich. 697.

39. *Turner's Appeal*, 48 Mich. 369, 12 N. W. 493.

40. *Wales v. Templeton*, 83 Mich. 177, 47 N. W. 238.

tator⁴¹, and the statute⁴² which provides that no will shall be effectual to pass either real or personal estate, unless it shall have been duly probated and allowed in the probate court, does not in any way affect the general rule, that a will speaks from the death of the testator⁴³.

§285. The Rule in Shelley's Case Abolished.

Under the statute⁴⁴, when a remainder is limited to the heirs, or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body of such tenant for life, and they shall be entitled to take as purchasers, by virtue of the remainder so limited to them. So a statute⁴⁵ provides that "when a remainder shall be limited to take effect on the death of any person without heirs or heirs of his body, or without issue, the words "heirs" or "issue" shall be construed to mean heirs or issue living at the death of the person named as ancestor.

§286. Restraints Upon Alienation.

The restraint upon the power of alienation is one of the arbitrary rules affecting devises by will under the statute, which imposes restraints upon the alienation of land. The absolute power of alienation shall not be suspended by any limitations or conditions whatever, for a longer period than during the continuance of two lives in being as the creation

41. *Richards v. Pierce*, 44 Mich. 444, 7 N. W. 54.

42. C. L. '97, §9281.

43. *Richards v. Pierce*, 44 Mich. 444, 7 N. W. 54.

44. C. L. '97 §8810.

45. C. L. '97 §8804.

of the estate. The rule relating to the suspension of the power of alienation as to personal property is the same as the rule at common law, i. e., during the continuance of a life or any number of lives in being at the creation of the estate, and, in case of a minor, until such minor becomes twenty-one years of age thereafter. Under the statute imposing limitations upon the accumulation of rents and profits of real estate the accumulation shall be for the benefit of minors, and then only during their minority.

§287. Construction as to Time When Estate Vests.

The stringent rule in the exposition of wills is that the intention of the testator as expressed in his will must prevail, but this rule is only to prevail when consistent with the positive rules of law, for it is said that for many reasons, not the least of which are that testators usually have in mind the actual enjoyment, rather than the technical ownership, of their property, and that policy as well as practical convenience require that titles should be vested at the earliest period. It has long been a settled rule of construction⁴⁶ in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event.

§288. General Rule as to Construction of Legacies.

The general rule as to construction of legacies is that if a testator gives a legacy to A. B. at the end of ten

46. *Hood v. Hovey*, 50 Mich. 395, 15 N. W. 525, *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

years after his death, the legacy is contingent, but if he gives it to A. B. to be paid to him at the end of the ten years, it is vested⁴⁷.

§289. Bequests on Condition.

A condition attached to a bequest which is not contrary to law, nor public policy nor good morals nor any matter of conscience will be held valid.

§290. General Residuary Bequests.

A general residuary bequest takes all lapsed and void legacies.

§291. Repugnant and Contradictory Clauses.

A general maxim in the construction of wills is that "where two clauses of a will are repugnant one to the other, the last in order shall prevail"⁴⁸.

§292. Construction as to Partial Invalidity.

It is manifest that, not only the four corners of the will but the amount of the estate of the testator and his surroundings, are to be considered in determining the meaning of ambiguous provisions in a will⁴⁹, and a will creating vested estate subject to trusts which might otherwise suspend the power of alienation beyond two lives in being makes the trusts void incumbrances⁵⁰, but a will containing provisions which are void, does not render invalid pro-

47. *Hibbler v. Hibbler*, 104 Mich. 274.

48. *Foster v. Stevens*, 140 Mich. 131, 109 N. W. 205.

49. *Sondheim v. Techenbach*, 137 Mich. 384, 100 N. W. 586.

50. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

vision that advancements made to the sons shall be charged against the devises made to them⁵¹.

§293. What Law Governs.

“The language of wills,” said Mr. Justice Story, “is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws of usage of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or controls such a condition.” Where a foreign will is admitted to probate here, Michigan courts should adopt the construction placed upon it by the courts of the state where the testator resided, unless the terms of the will clearly show that the testator had in mind the laws of this state or used language necessarily referring and only appropriate to this state⁵².

51. *Dean v. Mumford*, 102 Mich. 510, 61 N. W. 7.

52. *Ford v. Ford*, 80 Mich. 42, 44 N. W. 1057.

CHAPTER XVII.

CONTRACTS TO MAKE WILL.

- §294. In General.
- §295. Nature of the Contract.
- §296. Revocability of the Contract.
- §297. Conveyances Made to Defeat Rights Under Contract.
- §298. Statute of Fraud as to Contracts for Making Wills.
- §299. Equity Compel Conveyance of Land.
- §300. Performance or Breach.
- §301. Pleading in Actions for Breach.
- §302. Right and Remedies.

§294. In General.

Contracts relating to the disposition of one's estate after death are not infrequent, for it is no uncommon thing to make bargains intended to operate after death, and they have found their usefulness and legal substantiation in jurisprudence. They are akin to joint or separate mutual wills, and they may be divided into those contracts which are made between the testators and the contracts which are made between the testator and some third party.

§295. Nature of the Contract.

These contracts may take on various forms in that they may relate to dying intestate or making a person an heir, etc. They do not differ from other contracts. They must be based upon sufficient consideration to provide by will for a given object, and if they are satisfactorily proved and

established they must be enforced against representatives¹. In general it is settled that a person may make a valid contract binding himself to make a particular testamentary disposition of his property². Thus, an agreement whereby one undertakes to recompense another for services rendered for him, out of his estate after his death, is binding on the estate of such person deceased³. Again, a mutual agreement resting partly in parol and involving the disposition of land between a father and mother relating to their respective wills is valid⁴, so is a contract entered into between the testator and the devisee whereby in consideration of the devise of a certain real and personal property the devisee is to support the deviser during his life-time⁵. The requirements of an antenuptial contract for the support of the wife from the estate of her husband by providing a home and such amount monthly or quarterly as may enable her to live in comfort "and equal to such as she has previously enjoyed," and, in case of sickness, for such added amount as may be necessary for care, medical attendance, and other necessary expenditure, and at her death for funeral expenses, such allowance to be in lieu of all rights of dower and all rights in the personal estate of the husband, are met by a will devising to the wife (who was before marriage a woman without means) a life estate in the home farm, after taking off a part devised to a nephew,

1. *Faxton v. Faxton*, 28 Mich. 159, *Sword v. Keith*, 31 Mich. 247, *De Moss v. Robinson*, 46 Mich. 62, 41 Am. Rep. 144, 8 N. W. 712, *Carmichael v. Carmichael*, 72 Mich. 70, 1 L. R. A. 506, 16 Am. St. Rep. 528, 10 N. W. 173.

2. *Carmichael v. Carmichael*, 72 Mich. 70, 1 L. R. A. 506, 16

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3. *Sword v. Keith*, 31 Mich. Am. St. Rep. 528, 10 N. W. 173.

4. *Carmichael v. Carmichael*, 72 Mich. 70, 1 L. R. A. 506, 16 Am. St. Rep. 528, 10 N. W. 173.

5. *De Moss v. Robinson*, 46 Mich. 62, 41 Am. Rep. 144, 8 N. W. 712.

with the right to firewood from the latter part, and giving her absolutely the household furniture, two horses, two phaetons, and harness, and placing five thousand dollars in trust for her use, to be paid "from time to time," as her necessities may demand, and such provisions having been made, the widow may be compelled in equity to release her dower rights⁶. A verbal agreement by a mother to convey land to her adopted child in consideration of services to be rendered by the latter, though void under the statute of frauds, may be valid at least if there have been such acts of part performance as would entitle to equitable relief in an action to recover for such services, for the purpose of negating the presumption that they were gratuitously rendered⁷.

§296. Revocability of the Contract.

It is well settled that an oral contract to devise property to a specified person is revocable during the lifetime of the testator⁸, but where the devisee, in consideration of the devise of real and personal property, entered into a contract conditioned for the support of the deviser during his life-time and entered upon its performance, and without default on his part the deviser attempted to cancel and revoke the will and therewith the contract by conveying the land to a third party, in whose hands both papers had been deposited for safe-keeping, and received from him a mortgage conditioned for his support during life, such deed and mortgage were in fraud of the rights of the

6. *Thompson v. Tucker-Osborn*, 111 Mich. 470, 69 N. W. 730.

7. *In re Williams' Estate*, 106

Mich. 496, 64 N. W. 490.

devisee, he having acquired rights in the land which cannot be taken away from him by any act of the devisor, and which will at the death of the devisor entitle the devisee to the land by a specific performance of the contract if he continues to perform the agreement, or tenders a willingness so to do, but is prevented from doing so by the refusal of the devisor to accept such performance⁹.

§297. Conveyances Made to Defeat Rights Under Contract.

“There can be no doubt,” said Chancellor Williamson, “but that a person may make a valid agreement, binding himself legally to make a particular disposition of the property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance to be made at some specified future period, or upon the happening of some future event.” It is manifest that where an oral agreement is made between husband and wife to make a particular disposition of their real estate by last will and testament, and such agreement is fully performed on the part of the husband, and the benefits received and accepted by the wife, and, after the death of the husband, the wife makes a conveyance to defeat the agreement or in violation of the agreement, the conveyance may be set aside¹⁰. A party who on the strength of an alleged oral agreement made privately

9. *Bird v. Pope*, 73 Mich. 483, 72 Mich. 70, 1 L. R. A. 506, 16
41 N. W. 514.

10. *Carmichael v. Carmichael*, Am. St. Rep. 528, 10 N. W. 173.

between himself and his wife asserts his right to set aside a conveyance made by his wife to a trustee and for the same reason he seeks to become executor, legatee and devisee under a will which he declares his wife made and destroyed, is precluded from testifying to such oral agreement on the ground which precludes a surviving party to a transaction from testifying to matters equally within the knowledge of the deceased¹¹.

§298. Statute of Fraud as to Contracts for Making Wills.

In general it may be said that where an agreement rests in parol, the courts will regard it with suspicion, and it will not be sustained except upon very clear evidence of its terms and existence in that it was entered into understandingly by the decedent and based upon a valuable consideration. An agreement is taken out of the statute of fraud where pursuant to a mutual agreement resting partly in parol, and involving the disposition of land a husband and wife made their respective wills, and the husband died leaving his will unrevoked, and the wife accepted the provisions made for her benefit thereby constituting part performance and acceptance in compliance with the statute¹². An oral agreement to devise property to a specified person is not in itself valid if it covers real estate¹³. A verbal contract by a mother to convey land to her adopted child in consideration of services to be rendered by the latter is void under the statute of frauds¹⁴.

11. *Mundy v. Foster*, 31 Mich. 313.

12. *Carmichael v. Carmichael*, 72 Mich. 70, 1 L. R. A. 506, 16 Am. St. Rep. 528, 10 N. W. 173.

13. *De Moss v. Robinson*, 46 Mich. 62, 41 Am. Rep. 144, 8 N. W. 712. See *Bird v. Pope*, 73 Mich. 483, 41 N. W. 514.

14. *In re Williams' Estate*, 106 Mich. 490.

§299. Equity Compel Conveyance of Land.

It is clear that if an agreement is not within the statute of frauds, equity may compel those on whom the legal title has passed, to convey lands in compliance with the promise to give them by the will¹⁵.

§300. Performance or Breach.

It was a payment *prima facie pro tanto* in a case where it was agreed by one in consideration of services rendered by another that he should receive compensation from the estate of the former, but before his death he conveyed certain lands to the latter¹⁶.

§301. Pleading in Actions for Breach.

The allegation is sufficient that the agreement between the plaintiff and defendant was made in presence of the testator, and that he gave his assent to it¹⁷.

§302. Right and Remedies.

An agreement becomes a binding obligation of the estate for payment of a certain sum where an agreement was entered into in writing that in consideration of services rendered one of the parties was to allow the other to have a claim of a certain amount on a certain farm which the former owned; in the event that he died before he made a will, and where afterwards he died intestate¹⁸.

15. *De Moss v. Robinson*, 46 Mich. 63.

16. *In re McNamara's Estate*, 148 Mich. 346, 111 N. W. 1066. See *Thompson v. Tucker-Osborn*, 111 Mich. 470, 69 N. W. 730; *De Moss v. Robinson*, 46 Mich. 62,

41 Am. Rep. 144.

17. *De Boer v. Harmsen*, 131 Mich. 91, 90 N. W. 1036.

18. *Sword v. Keith*, 31 Mich. 247. See *In re Williams*, 106 Mich. 490, 64 N. W. 490.

CHAPTER XVIII.

PROBATE JURISDICTION.

- §303. Constitutional and Statutory Provisions.
- §304. Nature of Probate Jurisdiction.
- §305. The Power of the Court as to Extent.
- §306. Equity Jurisdiction in Probate Courts.
- §307. Jurisdiction and Proceedings.
- §308. Delay as to Probates.
- §309. Jurisdiction Necessary to Conclusiveness in Order to Make the Probate of a Will.
- §310. Necessity of Probate.
- §311. Delegation of Power.
- §312. Who May Propound a Will for Probate.
- §313. Probate of Will.
- §314. The Probate of Will Relates Back to Death of Testator.
- §315. The Effect of an Unprobated Will.
- §316. The Conclusiveness of the Probate of a Will.
- §317. The Revocation of Probate.
- §318. The Probate of Lost Wills.
- §319. Definition of Foreign Wills.
- §320. The Probate of Certain Foreign Wills.

§303. Constitutional and Statutory Provisions.

The matter of probate jurisdiction is regulated by statute, for it is generally conceded that, independent of statutory authority, neither equity nor law has any probate jurisdiction. It is provided in the constitution¹ that in each county organized for judicial purposes there shall be a probate court. The jurisdiction, powers and duties shall be prescribed by law, * * * and further it is provided² that judges of probate shall be elected in the counties in

1. Beecher's Annotated Constitution of 1908, Article XII, Section 13.

2. Beecher's Annotated Constitution of 1908, Article XII, Section 14.

which they reside, and shall hold office for four years and until their successors are elected and qualified. They shall be elected on the Tuesday succeeding the first Monday of November, Nineteen hundred twelve, and every four years thereafter. * * * Pursuant to similar constitutional provisions contained in the constitution of 1850, the statutes³ were passed providing that every judge of probate shall hold a probate court in his county, at the times and places established by law, and may adjourn the same from time to time as occasion may require, and that every probate court shall be a court of record, and have a seal; and each judge of probate shall keep a true and fair record of each order, sentence and decree of the court, and of all wills therein, with the probate thereof, of all letters testamentary and of administration, and of all other things proper to be recorded; and, on the legal fees being paid shall give true copies of the files, records and proceedings of the court, certified by him under the seal of such court; and further, the judge of probate for each county shall have power to take the probate of wills, and to grant administration of the estate of all persons deceased, who were at the time of their decease inhabitants of, or residents in the same county, and of all who shall die without the state, leaving any estate within such county to be administered; and to appoint guardians to minors and others in the cases prescribed by law and shall have and exercise all such other powers and jurisdiction as are or may be conferred by law.

§304. Nature of Probate Jurisdiction.

Courts of probate, it may be said, exercise jurisdiction

3. C. L. '97 §§§646, 647, 650.

over the estates of deceased persons and they collect the assets, allow claims, direct payments and distribution of the property to legatees or others who are entitled thereto, and, in general, they do everything to a final settlement of the affairs of the deceased, and the claims of creditors against the estate. Thus, the court of probate has general jurisdiction in matters testamentary and matters incidental thereto as well as other matters of probate⁴, and where no fatal defect appears on the face of the proceedings, its action in such matters is not void. It may be reversible on appeal, but it must stand if not appealed from⁵. "Courts of probate," said Justice Cooley⁶, "are courts of record, being declared to be such by the constitution, but they are not courts of law according to the ordinary use of the term. They derive their origin and jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system. Parties can not litigate questions of fact in them, except in the instance of the probate of wills, or when the power of appointment is to be exercised, and then no issues are joined by pleadings, no juries are known, and they render no judgment—their determinations being called orders, sentences, or decrees—and upon summary inquiry, with or without notice, as the case may be. If questions of fact, such as are the subjects of litigation at law, are to be determined within their jurisdiction; as, for instance, the allowance

4. *People v. Wayne Circuit Court*, 11 Mich. 593; *Schlee v. Darrow's Estate*, 65 Mich. 373, 132 N. W. 717; *Wilkinson v. Connaty*, 65 Mich. 627, 32 N. W. 841; *Morford v. Dieffenbacker*, 54 Mich. 605, 20 N. W. 600; *Alex-*

ander v. Riel, 52 Mich. 451, 18 N. W. 214; *Church v. Holcomb*, 45 Mich. 29, 7 N. W. 167.

5. *Church v. Holcomb*, 45 Mich. 29, 7 N. W. 167.

6. *Holbrook v. Cook*, 5 Mich. 225.

or disallowance of claims against an estate; they are generally determined through the action of commissioners appointed by the court, and from their decision no appeal lies to the probate, but does to the circuit court. The order and decree of these courts are subject to review only in virtue of statutory provisions, and not of their inferior character (for, primarily, they are not courts of inferior jurisdiction, as justices' and circuit courts are); and the statute confers the power of review only upon the circuit courts, through an appeal, and thereby confers upon such courts superior jurisdiction." Under the constitution, the probate court is, for most purposes, at least, a prerogative, and not a judicial, court, and has no jurisdiction over persons or property, except in such proceedings as relate to the estates of deceased persons, or those under disability and liable to wardship⁷. It is manifest that, strictly speaking, proceedings in probate and administration are not suits or actions, but they are of a mixed character and susceptible of institution and management upon altogether different principles than such as govern at common law. They may be brought and promoted by those who have no pecuniary interests, or by persons on whom the law, on account of the circumstances, shall have cast the duty; or they may, in particular instances, be initiated by the court. They partake of the proceedings *in rem*, and are often governed by the same principles. They may and often do bind persons not named in the record⁸.

§305. The Power of the Court as to Extent.

The courts of probate have exclusive jurisdiction to grant

7. Railroad Co. v. Chesebro, 74 Mich. 466, 43 N. W. 66.

8. Allison v. Smith, 16 Mich. 405.

administration upon the estates of deceased persons within the States, and for this purpose to allow probates of the wills of persons dying testate abroad, as well as at home⁹. It is apparent then that if the jurisdiction attaches, all the incidents relating thereto attach, and if full proof of the execution of a will is required, the court is privileged or has power to inquire into the amount or value of the disposition, and furthermore it has the power to construe wills¹⁰. But the court has no power to vacate an order admitting a will to probate¹¹, nor set aside its own adjudications and order a rehearing¹², for it is plain that the probate of wills under the statutes¹³ is merely a part of the proceedings to administer the estates of deceased persons¹⁴; nor in probating a will, has the court power to divest or decide on rights of property vested under proceedings valid on their face¹⁵. Furthermore, the probate court has no power to decide whether mutual wills form a contract and whether the maker of one has by revoking it estopped himself from claiming under the other¹⁶. It is essential to remember that probate courts derive none of their power from the common law, but the authority for all their acts must be found in the statute¹⁷.

§306. Equity Jurisdiction in Probate Courts.

It is well settled that courts of chancery have only jur-

9. Allison v. Smith, 16 Mich. 405.

10. Byrne v. Hume, 84 Mich. 185, 47 N. W. 679.

11. Corby v. Probate Judge, 96 Mich. 12, 55 N. W. 386.

12. Hitchcock v. Probate Judge, 99 Mich. 130.

13. C. L. '97, Chapter 33.

14. Lloyd v. Judge, 56 Mich. 236.

15. Besancon v. Brownson, 39 Mich. 338.

16. Lansing v. Haynes, 95 Mich. 16, 35 Am. St. Rep. 545, 54 N. W. 699.

17. Grady v. Hughes, 64 Mich. 540, 31 N. W. 438.

isdiction in those cases in which an adequate remedy does not exist in the probate court, but nevertheless, there is little doubt that a large portion of the old equity jurisdiction has been vested in this court¹⁸. Courts of probate stand in the same relation to persons under guardianship as did courts of chancery under the English system of jurisprudence¹⁹, and this jurisdiction was conferred by law with such of its incidents as appertain thereto²⁰, but probate courts have no power to order an accounting by a trustee in a will²¹, and there are cases in which it is not necessary to apply to a court of chancery for an order to sell land²². The rule that in cases of fraud courts of equity have concurrent jurisdiction with courts of law does not apply to cases for impeachment of a will for fraud²³.

§307. Jurisdiction and Proceedings.

The rule is well settled by international law that the jurisdiction to determine the validity or invalidity of wills belongs to the courts of the place of the domicile of the testator²⁴. It is apparent that under the general language of the statute²⁵ the jurisdiction extends to the probate of wills in general, to lost or destroyed ones, to settlements of estates²⁶, to the trying and determination of the validity of wills, relating to personal and real estate²⁷, and to their

18. *People v. Judge*, 11 Mich. 404.

19. *Andrew's Estate*, 92 Mich. 449, 52 N. W. 743.

20. *Taff v. Hosmer*, 14 Mich. 256.

21. *McBride v. McIntyre*, 91 Mich. 408, 51 N. W. 1113.

22. *Moore's Appeal*, 84 Mich. 474.

23. *Griffis v. Stoddard*, 2 Mich. N. P. 37.

24. *Scripps v. Wayne Probate Judge*, 131 Mich. 265, 100 Am. St. Rep. 614, 90 N. W. 1061.

25. C. L. '97, §§650, 651.

26. *Ewing v. McIntyre*, 133 Mich. 459, 95 N. W. 540.

27. *Griffis v. Stoddard*, 2 Mich. N. P. 37.

interpretation and construction²⁸. If there is a law authorizing a probate judge to entertain a petition for the allowance of a will, he should do so²⁹.

§308. Delay as to Probate.

A bill brought by an heir, after learning of the probate of a will which was probated twenty years ago, to set aside the will on the ground that the testator was incompetent, was barred on account of laches. Such a bill should be brought within a reasonable time, for "sound public policy and a just regard for the stability of private rights, require that the solemn judgments and decrees of courts, affecting the rights of property shall not be lightly disturbed, nor, without the strongest reason, allowed to be impeached, after any considerable time, during which the parties have been allowed to rely upon them"³⁰.

§309. Jurisdiction Necessary to Conclusiveness in Order to Make the Probate of a Will.

In order to make the probate of a will conclusive there must have been jurisdiction in the court to have granted probate. The maxim *Nemo es haeres viventis*, i. e., that the living can have no heirs is as well settled by statute³¹ as by common law. Although a statute was passed providing for the *ante mortem* probate of wills, the court decided that the probate of a will under the statute was inoperative and void for want of jurisdiction³².

28. *Byrne v. Hume*, 84 Mich. 185, 47 N. W. 679.

29. *Schober v. Wayne Probate Judge*, 49 Mich. 323, 13 N. W. 580.

30. *Corby v. Trombly*, 110

Mich. 292, 68 N. W. 139.

31. Public Acts of 1883, No. 25.

32. *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 N. W. 28.

§310. Necessity of Probate.

The statutes have abolished the distinction as to probate between wills passing real property and wills passing personalty in that they make no distinction between kinds of wills³³.

§311. Delegation of Power.

The common law rule to delegate the power of appointment has not been abrogated by statute. Thus, where a clause in a will confers upon the judge of probate the power of appointing an executor, such appointment when made by the judge is valid³⁴.

§312. Who May Propound a Will for Probate.

Any person who is interested in having the will admitted to probate may propound it. It is apparent that any person interested means any person who has a beneficial interest, such as devisees and legatees³⁵. A guardian has such an interest as will entitle him to petition for the probate of a will in favor of his ward³⁶, and likewise the interest of a widow is such as to entitle her to petition for the probate of a will³⁷.

§313. Probate of Will.

It is manifest that the original probate of a will must

33. Allison v. Smith, 16 Mich. 405.

34. Brown v. Just, 118 Mich. 678, 77 N. W. 203.

35. Mower v. Verflanke, 105 Mich. 398, 63 N. W. 302; Clow v. Plummer, 85 Mich. 550, 48 N.

W. 795.

36. Munford v. Diefenbach, 54 Mich. 236, 20 N. W. 600.

37. Lloyd v. Judge, 56 Mich. 236, 23 N. W. 28, 56 Am. Rep. 378.

take place in the court that has jurisdiction over the estate³⁸. The object of the proceedings which are in the nature of actions *in rem* is to establish the will and to have the *status* of an estate adjudicated as well as the interests of all the parties concerned³⁹. Whenever the paper propounded will have been subjected to every kind and degree of proof on probate which is necessary and essential according to its provisions, and it has been regularly adjudicated upon, its character as a testamentary instrument fixed, the will is then adjudged, established, and it becomes fully operative as a will⁴⁰.

§314. The Probate of Will Relates Back to Death of Testator.

The probate of a will affirms the title of the beneficiary under it from the time of the death, and the probate relates back so as to make valid whatever has been done previously, which, under the will after probate, the beneficiary would have had a right to do⁴¹. Thus, a will which has not yet been proved does not prevent a devisee of land or a party claiming under him from bringing ejectment, for a devisee may take his estate as of the death of the testator, except so far as otherwise provided by statute⁴². A residuary legatee of lands holds title from the time of the probate of the will, but subject to the antecedent legatees. If the land is not taken by the executors for the purpose of

38. Lloyd v. Judge, 56 Mich. 236, 23 N. W. 28, 56 Am. Rep. 378.

39. Steven v. Hope, 52 Mich. 68, 17 N. W. 698; Fraser v. Judge, 39 Mich. 138, Allison v. Smith, 16 Mich. 405.

40. Allison v. Smith, 16 Mich. 405.

41. Sutphen v. Ellis, 35 Mich. 446; Richards v. Pierce, 44 Mich. 444, 7 N. W. 54, Gray v. Froules, 86 Mich. 382, 49 N. W. 130.

42. Richards v. Pierce, 44 Mich. 444, 7 N. W. 54.

administration, the residuary legatee may have defended possession from the time the will is probated⁴³.

§315. The Effect of an Unprobated Will.

It is apparent that a will, until requisite adjudication upon probate is had, remains incomplete as an adjudged testamentary paper without any value as a will, but the lack of probate does not make it void⁴⁴. Where a person is named as a legatee in a will, he does not become a legatee until the validity of a will is determined⁴⁵, but where a will has not yet been proved, a devisee of lands or a party claiming under him is not prevented from bringing ejectment⁴⁶.

§316. The Conclusiveness of the Probate of a Will.

"The importance," said Chief Justice Shaw, "of making proof of a will, once for all and for all purposes, must be obvious. It determines the *status*, if it may be so called—the condition of a deceased person's estate. It must be settled as an estate testate or intestate. The establishment of the one necessarily excludes the other"⁴⁷.

§317. The Revocation of Probate.

The revocation of probate is not provided for by statutes, or its effect upon existing rights. Neither is there any statute providing for cases where a will, claimed to be later

43. Chapman v. Craig, 37 Mich. 370.

44. Allison v. Smith, 16 Mich. 405.

45. McFarlane v. Clark, 39 Mich. 44.

46. Richards v. Pierce, 44 Mich. 444, 7 N. W. 54.

47. Allison v. Smith, 16 Mich. 405. See Besancon v. Brownson,

39 Mich. 388.

in date than the one before probated, is presented for probate, nor is there a statute declaring the effect of probate of one will upon a later one which was known to exist before the time of the first probate, but not then produced⁴⁸. In a bill to set aside a fraudulent will, it is not necessary to set out the precise manner in which the fraud was accomplished⁴⁹.

§318. The Probate of Lost Wills.

A will which is lost or destroyed before or after the death of the testator does not cease to be a will provided it was lost or destroyed without the knowledge and consent of the testator. Such a will and its contents may be established by competent proof. Although a case involving the probate of a lost will has been fully tried in the probate court, a petition for the probate of the will on appeal to the circuit court may be amended by adding an allegation setting up the contents of the alleged will⁵⁰.

§319. Definition of Foreign Wills.

A foreign will may be defined as one executed or probated in another state, or another country. The general rule is well established that wills of real property are governed by the laws of the state in which the land is situate; while wills of personal property are governed by the laws of the domicile of the testator. This rule finds application as to the question concern-

48. *Besancon v. Brownson*, 39 Mich. 388. 236, 23 N. W. 28, 56 Am. Rep. 378.

49. *Smith v. Lloyd*, 56 Mich. 50. *Ewing v. McIntyre*, 133 Mich. 459, 95 N. W. 540.

ing the place where the will is to be probated. Thus, in order to entitle wills probated abroad to be admitted to probate here, the copy of the will presented must be accompanied by the foreign probate and due authentication thereof, and these together constitute the one instrument or subject matter to be acted upon under the statute, and all are essential to authorize the probate court to exercise the jurisdiction⁵¹. In the absence of anything to show that the will had been admitted to probate in another state, an order admitting it to probate in Michigan must be reversed⁵².

§320. The Probate of Certain Foreign Wills.

The statute⁵³ in relation to the probate of certain foreign wills provides that whenever it shall become necessary to make probate in this state of the last will of any deceased person, which was executed in a foreign country, by the laws of which no probate of wills, after the death of the maker, is required or provided for, if the original will cannot be produced in this state for probate, the same may be proved and allowed in this state by a full and complete copy thereof in the circuit court of chancery in and for any county, in which the maker of such will left any property, at his or her decease, affected by such will; and any person interested in the proof and allowance of any such foreign will, whether as executor, heir, devisee, legatee or otherwise, may file in any such circuit court in chancery a bill or petition setting forth the facts necessary to give said

51. Pope v. Cutter, 34 Mich. 150; With v. Cutter, 38 Mich. 189; See Clow v. Plummer, 85 Mich. 550, 48 N. W. 795; Besan-

con v. Brownsen, 39 Mich. 388.

52. Gibson v. Van Syckle, 47 Mich. 439, 11 N. W. 261.

53. C. L. '97. §§9305, 9306.

court jurisdiction in such case, making all proper persons parties thereto, and the proceedings thereupon to bring the defendants before the court shall be the same as is provided for in said court in other cases. Thus, where a foreign executrix applied for appointment as administratrix with the will annexed, the petition being made and signed by her attorneys in her behalf, and averring the probate of the will in Pennsylvania, she being named executrix in the will and where a duly authorized copy of the will and probate was then filed in the probate court to which the petition was directed and there being a certain amount of assets of the estate to be administered in the court where the application was made, it was decided that the petition was properly signed, and sufficiently showed the petitioner to be a person interested in the estate, and that a copy of the will was presented to the judge of probate, in which such interest appeared⁵⁴.

54. *Feustman v. Gott Estate*, 65 Mich. 592, 32 N. W. 869.

CHAPTER XIX.

CONTESTING A WILL.

- §321. Nature of Contest.
- §322. Grounds Upon Which the Probate of a Will May be Contested.
- §323. Who May Contest.
- §324. Pleadings.
- §325. Issue.
- §326. The Right to Open and Close.
- §327. Exclusion of Evidence.
- §328. The Right of Argument.
- §329. Jury Trial. Question Submitted.
- §330. Verdict and Findings.

§321. Nature of Contest.

The probate court derives none of its jurisdiction or power from the common law, but must find the authority for all its doings, including contests, in the statute¹, and many of the principles laid down in the authorities are not found in the liberal wording of the statute, but drawn by analogy from the probate proceedings of the English courts of probate. The proceedings in probate rest upon two modes in proving a will—the one mode of proving a will is provisional, the other final. It is manifest that after

1. C. L. '97 Chapter 33; Grady v. Hughes, 64 Mich. 545; 31 N. W. 438; Corby v. Judge, 96 Mich. 11, 55 N. W. 386.

Remedies: The Circuit Court has authority to give effect to a will, so as to preclude a suit to contest it, and it is not necessary for a proponent to call in a court

of equity to enjoin the contestants. Bean v. Bean, 144 Mich. 599, 108 N. W. 369.

A party may maintain a bill in equity without appeal from an order granting probate to a will where fraud, undue influence and deceit is alleged. Smith v. Boyd, 127 Mich. 417, 86 N. W. 953.

a will has been submitted for probate, proved and established; and the will remains uncontested nothing is left to be done, but to enforce it according to its terms or to construe it, if necessary. In a contest it is necessary that all the parties interested be cited to the proceedings; the will produced in open court; the witnesses examined and cross-examined by the parties in interest. The proceedings are neither in the nature of an action at law² or a suit in equity *in rem*³. The object of the proceedings in a contested suit is simply a mode of proving a will by which it is either established or rejected.

§322. Grounds Upon Which the Probate of a Will May be Contested.

The grounds upon which the probate of a will may be contested are as follows:

First, that the alleged will or codicil was not executed in accordance with the requirement of the law;

Second, that the execution was procured by undue influence;

Third, that the execution was procured by fraud;

Fourth, that the testator was not of testamentary capacity when he executed the will;

Fifth, that the will is a forgery; and

Sixth, that the revocation of the will had been effected.

§323. Who May Contest.

It may be stated that in general those who are entitled to some portion of the property of the testator can contest

2. Corby v. Judge, 96 Mich. 11, 55 N. W. 386.

3. Stevens v. Hope, 52 Mich. 65, 17 N. W. 608.

the will⁴. Such persons are devisees, legatees, executors⁵, trustees, heirs, guardian⁶, husband, widow⁷, and other persons claiming under the laws of succession. Thus, the next of kin of a minor may contest a will⁸. By refusing to probate the will at the place of the domicile of the testator, executors cannot prevent those interested from having the validity of the will determined⁹.

§324. Pleadings.

Courts of probate are courts of record, but their procedure requires no pleading in the technical sense. The true question in dispute should be clearly stated. Substance is more important than form. In the petition for the probate of a will it is not necessary to allege testamentary capacity¹⁰. Any technical question of pleading should not affect a decision so as to prevent substantial justice from being done.

§325. Issue.

In a court of probate the issue is *devisant vel non*, i. e., did he make a devise or not, or did he make a will. The inquiry can neither be enlarged nor contracted by pleadings, for there is one main issue and only one, and that is whether the paper propounded is or is not a will. There

4. Allison v. Smith, 16 Mich. 405; Jackson v. Hosmer, 14 Mich. 88.

5. Cheever v. Judge, 45 Mich. 6, 7 N. W. 186.

6. Morford v. Diffenbacher, 54 Mich. 594, 20 N. W. 600.

7. Lloyd v. Judge, 56 Mich. 236, 23 N. W. 28, 56 Am. Rep. 378.

8. Taff v. Hosmer, 14 Mich. 249.

On Question of Estoppel see Tilly v. Townsend, 110 Mich. 253, 68 N. W. 136.

9. Scripps v. Judge, 131 Mich. 265, 100 Am. St. Rep. 614; 90 N. W. 1061.

10. *In re* Hathaway's Appeal, 46 Mich. 326, 9 N. W. 435.

Foreign wills see Mower v. Verplanke, 105 Mich. 308, 63 N. W. 302.

may be more or less minor issues included, but they all belong to the same inquiry and cannot be presented separately¹¹. Testamentary capacity need not be alleged in a petition for probate of a will, for it is necessarily in issue¹². A statement made by the court that he supposed the question meant "was she mentally competent?" was not error¹³. It is discretionary with the circuit court to order an issue framed on an appeal from the allowance of a claim in probate court¹⁴.

§326. The Right to Open and Close.

The proponent naturally has the affirmative and it is his duty to make out a *prima facie* case both in relation to the fact of execution and the fact of the competency of the testator¹⁵. "The party assuming the burden of establishing a will," said Justice Cooley¹⁶, "has not supposed himself bound, in his opening, to go further than to give evidence, by the subscribing witnesses, of those facts which would make out, *prima facie*, a valid testamentary instrument; and has left all further evidence on the subject of mental capacity to be brought in by way of answer to that adduced by the contestant. The evidence at the opening has actually been of a formal character, and the proponent has confined himself to inquiries of a general nature respecting the signing and attestation, and whether, at the time, the party appeared to understand the business in which he was engaged. He has not been required to put

11. *In re* Hathaway's Appeal, 46 Mich. 326.

12. *In re* Hathaway's Appeal, 46 Mich. 326.

13. *Spencer v. Tury's Estate*, 133 Mich. 39, 94 N. W. 372.

14. *McGee v. McDonald*, 66 Mich. 628, 33 N. W. 737.

15. *Taff v. Hosmer*, 14 Mich. 309.

16. *Taff v. Hosmer*, 14 Mich. 309.

in the whole case on the question of mental competency before resting, and the cases are probably exceptional where he has gone beyond calling the subscribing witnesses, unless they failed to testify to such facts as would establish a *prima facie* case."

§327. Exclusion of Evidence.

The evidence should be competent, material and relevant to the issue, i. e., facts in issue and facts relevant to the issue may be proved, but "the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances in the case." It may be said that testimony as to mental aberration of the testator which existed some years before the will was made is not permissible, unless some testimony was offered showing the continuation of such mental aberration up to or near the time of the death of the testator¹⁷. The examination of a witness for the purpose of showing interest of one of the contestants, who, frankly admitting ill-feeling, was asked on cross-examination whether certain of the contestants had not professed a willingness in the probate court to withdraw from the contest, was not competent¹⁸. Where a particular subscribing witness out of several, to prove the due execution of a will was not called, the error of admitting a will is cured by calling him afterwards and allowing the contestants to cross-examine him¹⁹. When evidence is adduced tending to show unsoundness of mind in the testator, proofs of unsoundness are admissible²⁰.

17. *Lange v. Wiegand*, 125 Mich. 647, 85 N. W. 109.

18. *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628.

19. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

20. *Taff v. Hosmer*, 14 Mich. 309.

§328. The Right of Argument.

The right to open the argument belongs to the party who has the right to open the proofs; and that belongs to the proponent whenever there is any portion of his case which he is required to support by his evidence²¹. It is an unquestioned privilege that the counsel for the contestants has the right in his opening to state at length what he intends to prove as well as to state the facts and the law to the jury²². On the other hand, a statement is gross error and not permissible where counsel for the contestants in his opening made a statement that an issue whether the will of one person has been made freely and with due competency to show as a collateral issue whether the will of another person has been made under undue influence²³. A judge in a trial said to counsel for contestants: "I will say to you in view of your opening that you need not spend any time on the question of undue influence. Your opening does not disclose that undue influence can be shown or any undue influence such as would go to the jury. So you must confine yourself to the capacity of the testator." This statement to the jury is not error, although counsel for the contestants excepted to it, but they did not then or at any subsequent time say to the court that they desired to go into evidence to establish the allegation in their pleading that undue influence had been employed, nor was any suggestion made that anything had been omitted in the opening²⁴.

§329. Jury Trial. Question Submitted.

The duties of the jury are to pass upon the credibility

21. Taff v. Hosmer, 14 Mich. 309.

22. Prentis v. Bates, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153 overruling 88 Mich. 567, 50

N. W. 637.

23. Porter v. Thorp, 47 Mich. 313, 11 N. W. 174.

24. Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882.

of the witnesses, and to determine the facts involved in the case, and it is the province of the court to determine what questions are to be passed upon by the jury. In the probate of a lost will the submission to the jury of the questions, whether testator in fact made the will or whether he destroyed it with intent of revoking it, is permissible²⁵. So the question of undue influence is properly submitted to a jury where the making of the will was surrounded by suspicious circumstances²⁶. In a proceeding to set aside a will, the issue of undue influence may be submitted to the jury²⁷. It is error to withdraw the issue of undue influence from the jury²⁸. Questions pertaining to execution, such as, whether the document purported to be a will, and whether it was executed according to the requirements of the statute are within the province of the jury to determine²⁹, but a question whether the disposition of the testator was just or unjust is not a proper question for the jury³⁰. The jury may draw inference from facts which are more in accord with the theory of insanity than with the theory of sanity³¹, and the opinion testimony of experts must be weighed by the jury³².

§330. Verdict and Findings.

Although the verdict of the jury in contested will cases

25. *Ewing v. McIntyre*, 141 Mich. 506, 104 N. W. 787; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

26. *Buxton v. Emery*, 159 Mich. 341, 102 N. W. 948; *Wilson v. Parker*, 130 Mich. 638, 90 N. W. 682.

27. *Waters v. Reed*, 129 Mich. 131, 88 N. W. 394.

28. *Watts v. Watts*, 127 Mich.

607, 86 N. W. 1030.

29. *Ferris v. Neville*, 127 Mich. 444, 54 L. R. A. 464, 89 Am. St. Rep. 480, 86 N. W. 960.

30. *In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372.

31. *Prentis v. Bates*, 93 Mich. 234, 17 L. R. A. 404, 53 N. W. 153.

32. *Kempsey v. McGinniss*, 21 Mich. 123.

is only advisory³³, yet the court cannot direct a verdict sustaining the will where there is sufficient evidence to let it go to the jury³⁴. A sufficient verdict is one that finds that the will was the last will of the testator, that he was of sound and disposing mind, and that he was capable of disposing of his property³⁵.

33. *Ward v. Tinkham*, 65 Mich. Mich. 438, 53 N. W. 531.
695, 32 N. W. 901.

34. *In re Wilcox's Estate*, 93 Mich. 155.
35. *White v. Bailey*, 10 Mich.

CHAPTER XX.

ACTION FOR CONSTRUCTION OF WILLS.

- §331. Jurisdiction of Courts.
- §332. The Nature of the Proceedings.
- §333. Right of Action. When Action Lies.
- §334. Who May be Parties.
- §335. Pleadings.
- §336. Scope of Inquiry and Trial.
- §337. Appeal and Review.
- §338. Costs and Fees.

§331. Jurisdiction of Courts.

Courts of probate have always been recognized as having jurisdiction to construe wills¹, for such power is necessarily involved in the power to assign the estate of a testator on the settlement of an executor's account². Under the statute³ these are courts of construction of wills, relating to real as well as to personal estates, and that they may exercise this jurisdiction, the same as courts of equity, is well settled⁴. The court may exercise jurisdiction in a case where executors appear and answer a bill filed by a legatee asking for a construction of the terms of a will if held valid, and asserting that it is as a whole invoked in equity, and in terms submit the question of the construc-

1. Langrick v. Gospel, 48 Mich. 185, 12 N. W. 38; Kelly v. Reynolds, 39 Mich. 464; Patterson v. Stewart, 38 Mich. 402.

2. Glover v. Reid, 80 Mich. 228, 45 N. W. 91. Byrne v.

Hume, 84 Mich. 185, 47 N. W. 679.

3. C. L. '97 §§9443, 9444, 9445,

4. Glover v. Reid, 80 Mich. 228, 45 N. W. 91.

tion of the will to the court⁵. The probate court has no jurisdiction over matters in a will, the fair construction of which is that the testator placed his property under the control of the executors and trustees during the life of the beneficiary, to see that its provisions, made for her support and comfort, be carried out, unless jurisdiction is conferred by the will or in the event of a disagreement between the executors, either party might apply to the court to determine the question in dispute⁶. In this case there was no disagreement between the executors, and neither did the will expressly nor impliedly require her to apply to the probate court for the authority to use any of the principal for her support and comfort, nor does it confer upon the tribunal the authority to determine her needs⁷.

§332. The Nature of the Proceedings and the Remedy.

The proceedings are not a bare formality in which the construction of wills or the statutes of descent and distribution are involved, for they are open to contest, and great judicial caution, and learning is required to do substantial justice, in fact, the problems are some of the most difficult in law. The construction of a will may be involved in almost any litigation when the title to property based upon a will is in question. Such questions may arise in partition as well as in ejectment suits. The nature of the proceedings in a suit for the construction of a will is not in the nature of a contest, but a suit for the construction of a will may be the means of contesting its validity before its construction is taken up, neither are the pro-

5. *Dean v. Mumford*, 102 Mich. 510, 61 N. W. 7.

81 N. W. 89.

6. *Hull v. Hull*, 122 Mich. 338,

7. *Hull v. Hull*, 122 Mich. 338,

81 N. W. 89.

ceedings in the nature of a reformation, for the rule is fundamental that there can be no reformation of a will on the ground of mistake, fraud or surprise as is the case in conveyances of real estate or other contracts. The nature of the remedy in suits to construe wills is such that it is improper to interject into the proceedings, by cross-bill or otherwise the account of the guardian, for the repayment of monies advanced and expended for the support of one of the infant children of the testator⁸.

§333. Right of Action. When Action Lies.

Courts of probate have jurisdiction as fully and completely upon questions relating to the construction of wills as courts of equity⁹. It is manifest that suits to construe wills are equitable in their nature, and that consequently they will extend to all such subject matter as is of an equitable nature and which is likely to enter into the construction of wills. The right of action is of such a nature that courts cannot inquire into the propriety of any disposition which a testator may see fit to make of his property by a legally executed will so long as it is not unlawful nor can an astute construction be applied so that provisions claimed to be unjust are defeated¹⁰. It is clear that if an estate is actually vested by a will, subject only to certain trusts, the character of the trusts cannot concern those heirs at law who are not legatees¹¹. It is necessary to construe the will in a case where a question of heirship

8. *Pray v. Railer*, 144 Mich. 208, 107 N. W. 1070.

9. *Byrne v. Hume*, 86 Mich. 546, 49 N. W. 576, S. C. 84 Mich. 185, 47 N. W. 679; *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91;

Toms v. Williams, 41 Mich. 552, 2 N. W. 814.

10. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

11. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

arises by one having a right to inherit from the testator¹². In a case where a legatee brings an action, asking for the construction of the terms of a will if held valid, but at the same time asserting that the will as a whole is invalid in equity, the action may be maintained¹³. An action to construe a will will lie under proper circumstances when the will is ambiguous¹⁴ or doubtful in meaning or when some instructions or directions are required for immediate action to carry out the provisions of the will¹⁵. Mere abstract questions will not be determined in a suit to construe a will, neither will questions be determined by courts of equity before they become necessary to direct the acts of the trustee executors; nor will a will be mentioned for construction where by an action of ejectment the rights derived by the conveyance under which title is claimed may be determined¹⁶.

§334. Who May be Parties.

In general it may be said that it makes no difference whether the proper parties bring the suit or not, if the executors appear and answer a bill filed by a legatee, asking for the construction of the terms of a will, the proper parties are before the court and the court has jurisdiction¹⁷. Executors or administrators with the will annexed, or testamentary trustees, or beneficiaries may be parties to an action to construe a will¹⁸.

12. *Van Derlyn v. Mack*, 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669.

13. *Dean v. Mumford*, 102 Mich. 510, 61 N. W. 7.

14. *Southgate v. Karp*, 154 Mich. 697, 118 N. W. 600.

15. *Palms v. Palms*, 68 Mich.

355, 36 N. W. 414.

16. *Warren v. Warren*, 151 Mich. 95, 114 N. W. 887; *Hume v. Bone*, 120 N. W. 17, 16 D. L. N. 12.

17. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

18. *Van Derlyn v. Mack*, 137

§335. Pleadings.

A suit for the construction of a will in a court of equity must be by bill, for equity makes a distinction between informal application by petition and formal application by bill.

§336. Scope of Inquiry and Trial.

In a hearing or trial to determine a suit for the construction of a will, what is called for is that the court shall be placed in the situation the testator occupied when he made the will, and in that situation of advantage read the words as written, and then interpret and apply them, unless there is such an uncertainty that the law is fairly baffled. It is clearly not an occasion offered to witnesses to insert something the testator left out or to cut out something he put in. In findings of fact must be embodied the conclusion on evidence in cases at law¹⁹. It is improper to interject by cross-bill or otherwise the account of a guardian²⁰.

§337. Appeal and Review.

The questions of appeal are regulated by statute²¹, and therefore do not come entirely within the scope of this book. It is nevertheless essential to note some of the general questions relating to review. An appeal from a construction of a will which disposes of both kinds of property may be taken by devisees who have kept their interest

Mich. 146, 100 N. W. 278, 100 Am. St. Rep. 664, 66 L. R. A. 437.

19. Tuxbury v. French, 41 Mich. 7, 1 N. W. 904.

20. Pray v. Railer, 144 Mich. 208, 107 N. W. 1076.

21. C. L. '97, Chapter 33.

in the personalty of the testator, but have conveyed their interest in the real estate²². Courts are bound to consider the interests of infant legatees in an appeal from a construction of a will whether the infants have appealed or not²³. To enable the Supreme Court to review the proceedings of the lower court, it is essential that it have the findings which were weighed in determining the decision of the lower court²⁴. A reversal of the decree and dismissal of the bill with costs of both courts to defendants may result on an appeal in a case where a will was incorrectly construed and valid objections were made to the jurisdiction²⁵.

§338. Costs and Fees.

In general it may be said that costs are properly charged against the estate in a suit for the construction of a will²⁶, and so may the costs be paid out of the estate where the findings as to the distribution under the will have been set aside on appeal²⁷. Furthermore the costs of a litigation to determine the right to a fund under a will may be paid out of the fund²⁸. An executor is entitled to costs in a case where one makes a claim for a share of an estate in which she has no interest, for to impose costs upon the estate is an indirect way of making the true owners of the property pay them, which ought not to be required²⁹.

22. *Revenett v. Bourquin*, 53 Mich. 10, 18 N. W. 537.

23. *Toms v. Williams*, 41 Mich. 552, 2 N. W. 814.

24. *Tuxbury v. French*, 41 Mich. 7, 71 N. W. 404.

25. *Hogan v. Hogan*, 44 Mich. 147, 6 N. W. 206.

26. *Wilson v. Odell*, 58 Mich. 533, 25 N. W. 506.

27. *Appeal of McClintock*, 58 Mich. 152, 24 N. W. 549.

28. *Appeal of Turner*, 48 Mich. 369, 12 N. W. 493.

29. *Van Derlyn v. Mack*, 137 Mich. 146, 66 L. R. A. 437, 109 Am. St. Rep. 669, 100 N. W. 278.

CHAPTER XXI.

EVIDENCE.

- §339. Importance of Subject.
- §340. Definition in General.
- §341. Competency.
- §342. Burden of Proof. In General. Execution.
- §343. — Capacity.
- §344. — Undue Influence.
- §345. Presumption. In General.
- §346. — Execution.
- §347. — Capacity.
- §348. Illustration. Issue. Order of Proof.
- §349. Relevancy.
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- §351. — Capacity.
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- §354. — Execution.
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- §358. — Execution.
- §359. — Capacity.
- §360. Preponderance of Evidence.
- §361. — Execution.
- §362. — Capacity.
- §363. — Undue Influence.
- §364. Extrinsic Testimony to Aid Construction.
- §365. — In General.
- §366. — To Show Intention.
- §367. — Ambiguity.
- §368. — Copy.

§339. Importance of Subject.

Although this subject is not strictly within the scope of this book, yet its importance is apparent to every practitioner for the reason that the questions which arise are:

First, by what evidence can the will be established:

Second, by what evidence can the capacity or incapacity of the testator be proved, if contested;

Third, by what evidence can light be shed upon the will for the purpose of giving it a proper construction.

Again, the adjective law of evidence, as is applicable to wills, is so closely allied to the substantive law of wills that they deserve to be treated together.

§340. Definition in General.

Evidence is that which is legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it¹. As to the distinction between evidence and proof it has been said that evidence is that which tends to convince; proof is that which convinces, or the former is the medium of proof and the latter, the effect of evidence².

§341. Competency.

In general a statute³ provides that on the trial of any issue joined, or in any matter, suit or proceeding, in any court or before any officer or person having by law, or by consent of parties, authority to hear, receive and examine evidence, the parties to any suit or proceedings named in the record, and persons for whose benefit such suit or proceeding is prosecuted, or defended, may be witnesses thereon in their own behalf or otherwise, in the manner as other witnesses, except as otherwise provided

1. Auditor General v. Board of Supervisors of Menominee County, 89 Mich. 618, 51 N. W. 483.

2. Jastrzembski v. Marxhausen, 120 Mich. 683, 79 N. W. 935.

3. C. L. '97 §10211.

by law. An exception to this statute is a provision⁴ which provides that when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be permitted to testify at all to matters which if true must have been equally within the knowledge of such deceased person. Under the statute of revocation⁵, it was maintained that a residuary legatee was a competent witness for the executor in a suit brought to recover a debt due the estate and it was further decided that a legatee is neither a party to the probate proceedings nor one in whose immediate and individual behalf the proceedings are wholly or in part brought⁶. In probate proceedings the evidence of subscribing witnesses is not conclusive either way, nor does the law presume that they are either more or less than others. It presumes they had, when signing, full knowledge of what they were doing, and in case they are dead their attestations when proved is *prima facie* evidence that all was done as it should be⁷, for no rule of law is known which makes the probate of a will depend upon the recollection, or even the veracity of a subscribing witness. It is manifest that the law for wise and obvious reasons requires a will to be executed and attested with such precautions as will usually guard against fraud. The forgetfulness or falsehood of a subscribing witness cannot invalidate a will, for if such were the case, it would be easy, in many cases, to use such artifices and deceptions as would

4. C. L. '97 §10212

411.

5. C. L. '97 §9270.

7. Abbott v. Abbott, 41 Mich.

6. Lawyer v. Smith, 8 Mich. 540, 2 N. W. 810.

render the will nugatory⁸. It was under the statute⁹, providing for the execution and attestation of a will, that the death of an attesting witness or of all of the attesting witnesses, is not to defeat the validity of the will if in fact duly executed. It merely changes the form of the proof and allows of the introduction of secondary evidence of the due attestation and execution of the will. To show such attestation the method of procedure is the same as it would be in the case of deeds, by proof of the handwriting of the witness. That being shown, *prima facie*, it is to be taken as true, and to have been put there for the purpose stated in connection with the signature. It is to be assumed, as regards that witness, that he duly attested the will in the presence of, and at the request of the testator. Then, where all the subscribing witnesses to a will were dead at the time of probate, the will, as established by secondary evidence, was satisfactorily proved within the meaning of the statute¹⁰. It is also provided by statute¹¹ that if none of the subscribing witnesses shall reside in this state, at the time appointed for proving the will, the court may, at the time appointed for proving the will, in its discretion, admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution of the will, may admit proof of the handwriting of the testator and of the subscribing witnesses. The competency of a certified copy of a will is based upon statute¹² which provides that every will, when proved as provided by law,

8. *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810.

9. C. L. '97, §9266.

10. *In re Sullivan*; Will, 114 Mich. 189, 72 N. W. 135.

11. C. L. '97, §9280.

12. C. L. '97, 9297.

shall have a certificate of such proof indorsed thereon or annexed thereto signed by the judge of probate and attested by his seal, and every will so certified, and the record thereof, or a transcript of such record so certified by the judge of probate and attested by his seal, may be read in evidence in all courts within this state, without further proof¹³. In all contested cases the case is open for general witnesses, and when the testimony is all in, each witness is credited according to the impression he leaves of candor and intelligence, and not according to his being or not being an attesting witness¹⁴.

§342. Burden of Proof. In General. Execution.

In the ordinary affairs of life there is no obligation on any one to prove an assertion, unless for the purpose of convincing or satisfying an inquiring mind of the accuracy, truthfulness and importance of the assertion or for the purpose of casting off the imputation of idle boasting, but in law the burden of proof is an obligation that must be complied with if the assertion is to have effect in law. In general it is said that the burden of proof lies upon the party who seeks to support his case by a particular fact of which he is supposed to be cognizant¹⁵, and the general rule is that in every case in which there is *prima facie* evidence of any right existing in any person, the burden of proof is always on the person or party calling such right in question¹⁶. The burden of proof as to the circumstances

13. Ives v. Kimball, 1 Mich. 308.

14. Abbott v. Abbott, 41 Mich. 540, 2 N. W. 810.

15. Stewart v. Ashley, 34 Mich. 183; Wildey v. Crane, 69 Mich.

17, 36 N. W. 734.

16. Walker v. Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187; Hynes v. Hickey, 100 Mich. 188, 66 N. W. 1090.

legally essential to the execution of the will rests upon the proponent who seeks to probate the will¹⁷. In a case where a party claims that a will was revoked by the subsequent execution of another will, which was afterwards destroyed by the testator, the burden of proof falls upon him to show that the later will contained an express provision of revocation¹⁸.

§343. — Capacity.

In testamentary cases the burden of proving capacity is not merely cast in the first instance upon the proponent who must aver it, but it abides with him during the trial¹⁹. The proponent before resting is bound to make a *prima facie* case on the averment of soundness of mind, but the necessity of making such a case on that point involves the production of some other evidence of testamentary capacity than is furnished by the legal presumption²⁰. In a particular class of cases, and upon the question of mental soundness or unsoundness, after a *prima facie* case has been established by the proponents, the case, for all purposes connected with the order of proof, throughout, rested upon the contestants to show mental incapacity²¹. The burden of proof is in the proponent of a will to establish capacity by other evidence than the presumption of sanity,

17. *In re Mansbach's Estate*, 150 Mich. 348, 114 N. W. 65.

18. *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 419, 37 L. R. A. 561, 64 N. W. 455. *Dudley v. Sates*, 124 Mich. 440, 86 N. W. 956.

19. *Aiken v. Weckerley*, 19 Mich. 482, *Beaubien v. Cicotte*, 8

Mich. 9; *Prentiss v. Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153, overruling 88 Mich. 567, 50 N. W. 637. *Moriarty v. Moriarty*, 108 Mich. 249 65 N. W. 964.

20. *Taff v. Hosmer*, 14 Mich. 309.

21. *Kemprey v. McGinniss*, 21 Mich. 123.

and the presumption cannot have the force of an independent fact to serve as a substantial make weight against the counter-proof²². Thus, it is clear that the proponent of a will has the affirmative by which he must make out a *prima facie* case of the competency of the testator as well as the fact of the execution of the will, but when he has made out a *prima facie* case and the contestant has rested the proponent may then go fully into the subject of mental capacity²³. In a contest of a will where the facts of chastity are involved, it does not mean that contestant must introduce affirmative testimony upon this subject, for he might, if he chooses, rely upon the presumption of chastity which, in the absence of testimony, would obtain²⁴.

§344. — Undue Influence.

The party who asserts that the will ought not to have any force or effect because it was procured by undue influence, has the burden of proof to show affirmatively that it was so procured²⁵. The proof in cases of this kind must be made out in most, if not in all instances by circumstantial evidence; by proofs of facts and circumstances which, standing alone, might tend to satisfy a jury of the existence of the principal fact of undue influence²⁶.

§345. Presumption. In General.

Evidence is divided into direct or positive and indirect or circumstantial. Direct or positive evidence is evidence

22. Aiken v. Weckerly, 19 Mich. 482; Taff v. Hosmer, 14 Mich. 309.

23. McGinniss v. Kempsey, 27 Mich. 363; Aiken v. Weckerly, 19 Mich. 482.

24. O'Dell v. Goff, 153 Mich. 645, 117 N. W. 59.

25. *In re* Shepardson's Estate, 53 Mich. 106, 18 N. W. 575.

26. Porter v. Throop, 47 Mich. 313, 11 N. W. 174.

to the precise point in issue. Indirect or circumstantial evidence is proof of a series of other facts than the facts in issue which by experience have been found so associated with that fact, that, in the relation of cause and effect, they lead to a satisfactory and certain conclusion. Presumptive evidence is a species of circumstantial evidence. The doctrine of presumptive evidence proceeds upon the theory that an inference can be drawn as to the existence of a fact from another fact that is proved, and which most usually accompanies it, while, likewise, the doctrine of circumstantial evidence proceeds in reasoning from facts which are known and proved, to establish such as are conjectured to exist. A presumption arises when a fact in issue cannot be demonstrated by direct evidence and, therefore, it becomes necessary to establish such fact by the introduction, in evidence of circumstantial facts which come the nearest to the proof of it, and the proof of these circumstantial facts, which are necessarily or usually closely associated with such fact in issue, create a presumption. This presumption is relied upon until the contrary is established. There are two kinds of presumptions: Those of law and those of fact. The former has been defined as a rule which in certain cases, either forbids or dispenses with any ulterior inquiry²⁷, while the latter is a mere argument upon the fact in a case; depending upon its own natural force and efficacy in generating belief or conviction in the mind²⁸. Thus, presumptions of fact may be said to be natural presumptions, for the reason that they are founded upon the common experiences of mankind, independent of any aid or control of law, and have their source wholly and directly

27. Greenleaf on Evidence, §14.

28. Grienleaf on Evidence, §14.

in the circumstances of a particular instance. It is apparent that every subject of law has its presumptions, even the subject of wills²⁹.

§346. —Execution.

A presumption that a will was destroyed with the intent of cancellation is raised by the proof of the fact that the will was kept in the custody of the testator and could not be found after his death³⁰. Under the maxim "*Omnia praesumuntur in odium spoliatoris*", a legal presumption

29. A presumption arises on proof of the signature of the deceased that he knew and approved of the contents and effect of the instrument he signed.

A presumption arises that the testator approved of the contents of the will where proof can be furnished that, prior to the execution of the will by heirs, it was either read over to him, or otherwise brought specially to his attention.

A presumption arises, when several sheets of paper constituting a connected disposal of property, are found together, the last only being duly signed and attested as a will, in the absence of fraud or direct proof, and even in spite of partial inconsistencies in some of the provisions, that each of the sheets so found formed a part of the will at the time of its execution.

A presumption arises in favor of attestation that, if the testator *might* have seen, he *did* see the witnesses subscribe their names, and the fact of his being in the same room with them is *prima facie* evidence of their attestation in his presence.

A presumption arises, in the absence of any evidence to the contrary, that all attestations *interlineations*, or *erasures*, which appear on the face of the will, are made after execution of a codicil thereto.

A presumption arises where a will, traced to the possession of the testator, and last seen in his custody, be not forthcoming on his death, that it has been destroyed by himself, *animus cancellando*, and this presumption which is obviously founded on good sense, must prevail, unless there be sufficient evidence to rebut it.

A presumption arises, in absence of any distinct intimation to the contrary, that every testator considers his estate sufficient to answer the purposes to which he has devoted it by his will and consequently, in the event of any deficiency arising in the assets, all animosities and legacies will, *prima facie* be held to abate ratably.

30. *Cheever v. North*, 106 Mich. 390, 37 L. R. A. 561, 53 Am. Rep. 497, 64 N. W. 455.

may arise that it was legally drawn and executed from the proof of admissions, establishing the fact of revocation which had been fraudulently suppressed or destroyed³¹. The presumption from keeping a will uncanceled is that its execution was not procured against the will of the testator or against his intelligent consent³². There is no legal presumption against the validity of any provision which a husband may make in favor of his wife³³.

§347. —Capacity.

The presumption of sanity cannot have the force of an independent fact to serve as a substantial make-weight against counter proof³⁴. All presumptions of undue influence over a person of sound mind are excluded by rule of law³⁵. It is apparent that the presumption of undue influence arising from a will being drafted by a beneficiary, or by one in confidential relations, may be overcome by showing that it was executed freely and under circumstances which rebut the inference of undue influence³⁶. There is no presumption that undue influence has been exercised in a case where by common consent the person of the testator has been committed to the care of him who is charged with the exercise of undue influence³⁷. No presumption of undue influence is raised where a testator fails to give all his property to his near relatives, with some of whom he was not on good terms³⁸.

31. *In re Lambie's Estate*, 97 Mich. 49, 56 N. W. 223.

32. *Pierce v. Pierce*, 38 Mich. 412.

33. *Latham v. Udell*, 38 Mich. 238.

34. *McGinniss v. Kempsey*, 27 Mich. 363.

35. *In re Shepardson's Estate*, 53 Mich. 106, 18 N. W. 575.

36. *In re Bromley's Estate*, 113 Mich. 53, 71 N. W. 523.

37. *Severance v. Severance*, 90 Mich. 417, 52 N. W. 292.

38. *In re Merriman's appeal*, 108 Mich. 454, 66 N. W. 372.

§348. Illustration. Issue. Order of Proof.

By direction of the trial court an issue is made in that court to determine in a particular case³⁹ the following facts:

First, the domicile of the testator at the time of his death;

Second, whether the alleged will was his last will and testament;

Third, whether he was of a sound and disposing mind at the time same was made and was not under the undue influence of a certain person or some other person at the time.

The course or order of submitting evidence in a particular case⁴⁰, upon the question of capacity, is in compliance with the rule⁴¹ where introduced as follows:

First, the proponents introduce the subscribing witnesses, to prove the execution of the will, and make the formal or *prima facie* proof of the soundness of the testator's mind, without going into particulars of the testator's sickness or its effect upon his mind, and rested.

Second, the contestants then go fully into their case to show the incompetency of the testator, introducing a number of witnesses, some of whom have seen and observed the testator during his sickness, who, after stating the facts, give their opinions as to the condition of his mind and others, who are physicians, giving their opinions upon the state of facts shown by those, who spoke from observation, and upon the hypothesis that such facts are true.

39. White v. Bailey, 10 Mich. 155.

40. Kempsey v. McGinniss, 21 Mich. 123.

41. Kempsey v. McGinniss, 21 Mich. 123. Aiken v. Weckerly, 19 Mich. 482; Taff v. Hosmer, 14 Mich. 309.

See 174 Mich. 473 -
on burden and presumption

Nearly all this testimony tends to show the incapacity of the testator.

Third, the proponents, after the contestants rest, introduce evidence in reply, and go fully into the question of the competency of the testator, his previous habits of life and state of health, his feelings toward his relations, his sickness and its effects, mental and physical, the state of his mind, and degree of intelligence at the time, introducing, among other evidence, the opinion of several medical witnesses based upon a hypothetical state of facts shown mainly by their witnesses who have spoken from personal observation; and which differed, to some great extent, from the state of facts shown by the contestants, and upon the assumption of which their professional witnesses have given their opinion.

The proponents then rest.

§349. Relevancy.

Relevancy is that which conduces to the proof of a pertinent hypothesis⁴². Any facts or circumstances to be relevant must stand in such a relation to the issue that its connection tested by logical reasoning is apparent unless interfered with by some formal rule of law pertinent to the matter in issue through which the logical sequence is broken. In other words relevant, it has been said, means that any two facts to which it is applied are so related to each other, that, according to the common course of events, one, taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other. In general it may be said that

42. Bl. Com. 321.

the relevancy of the evidence depends upon the issue to be tried⁴³. It is axiomatic that some cases require a larger scope of inquiry and investigation than others. The issue being the motive of a person for doing something out of the ordinary course of events, it follows that under the main issue, all the surrounding circumstances and influences that might contribute or cause such motive may be made the subject of inquiry⁴⁴.

§350. Admissibility. Execution.

The test of the admissibility of evidence is the rule of relevancy⁴⁵. The questions, put to a subscribing witness, where he was called to prove a will upwards of thirty years after the date of execution, and testified that he signed it as a witness, but that he had no distinct recollection of seeing the testatrix sign it by looking at the attestation clauses, whether he had any doubts she signed it in his presence, whether he ever witnessed an instrument in that form without knowing what it was, and whether he had any doubt that the persons whose names were appended to it were present at

43. *White v. Bailey*, 10 Mich. 155.

44. *White v. Bailey*, 10 Mich. 155.

45. The general rule, which governs the production of testimony, is that the evidence must be confined to the points in issue. This rule not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the *mode* of proving even the issues themselves.

Facts so intimately connected

with the facts in issue as to form part of the same transaction or subject matter must be deemed relevant to it.

Facts not directly in issue, but pertinent thereto are relevant.

Facts showing probable cause for existence or non-existence of fact in issue, are relevant.

Facts showing *animus* as well as similar occurrences showing intention are relevant.

Facts explanatory of pertinent facts are relevant.

the time of its execution, were admissible⁴⁶. It is clear that the admissions of a sole devisee relating to the existence of a later and revoking will are clearly admissible on the ground that he alone is interested in the will which his representatives seek to probate⁴⁷. On proceedings to probate a will, all facts regarding a testator's fortune and the circumstances and relations of his family, within his knowledge as would naturally influence him in making his testamentary dispositions, are admissible⁴⁸.

§351. —Capacity.

In contest of will cases the rulings upon the admission or rejection of testimony must be based entirely on the legal quality of the testimony offered⁴⁹. In order to establish testamentary capacity, it is essential that it must be shown by proper evidence that a testator must have understood substantially the nature of the act, the extent of his profits, his relation to others who might or ought to have been objects of his bounty, and the scope and bearing of the provisions of his will, and have had sufficient active memory to collect in his mind, without prompting, the elements of the business he transacted, and to have held them in his mind a sufficient length of time to have perceived at least their obvious relations to each other, and to have been able to form some rational judgment in relation to them and yet, it is not necessary to show that he needed the same perfect and complete understanding and appreciation of any of these matters, in all their bearings, as a person in

46. *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

47. *In re Lambie's Estate*, 97 Mich. 49, 56 N. W. 223.

48. *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 223.

49. *Pierce v. Pierce*, 38 Mich. 412.

sound and vigorous health of body and mind would have⁵⁰. In making proof of mental incompetency any fact which is more consistent with that theory than with the theory of mental soundness is admissible⁵¹. It may be said in relation to the admissibility of evidence as to testamentary incapacity that the court should be carefully guarded where it is apparent that the witness bases the incapacity upon his knowledge that the testator was subject to delusions, the nature of which did not affect such capacity⁵². Again, it is incumbent on courts to keep out of contest cases everything which is merely calculated to create prejudice without throwing light on capacity, and prevent the establishment of fallacious tests which no one would think of acting on in business transactions to throw doubt on testamentary capacity⁵³. Evidence showing that the testator was a young man of average intelligence is admissible for the purpose of establishing testamentary capacity⁵⁴. It is clear that evidence showing the extent of testator's property, and his next of kin as well as the relations existing between him and any beneficiary under the will is admissible as bearing on the question of mental capacity⁵⁵; so facts showing that at the time the testator executed the will, he had sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep those facts in his mind long enough to dictate his will with-

50. *Kempsey v. McGinniss*, 21 Mich. 123.

51. *Prentiss v. Bates*, 93 Mich. 234, 17 L. R. A. 499, 53 N. W. 153.

52. *Rice v. Rice*, 53 Mich. 432, 19 N. W. 132..

53. *Pierce v. Pierce*, 38 Mich. 412.

54. *In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372.

55. *Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627.

out prompting from others, are admissible⁵⁶. In proceedings to set aside a will a recital, in an order adjudging him incompetent to manage his estate, that a man is insane is not only superfluous, even if it be proper, but is not such evidence of testamentary incapacity as to be admissible⁵⁷. Facts of forgetfulness may be admitted, but standing alone they do not make up evidence of incompetency, nor are they sufficient basis for expert testimony as to the question of sanity⁵⁸. The question whether or not testator was an eccentric man is admissible⁵⁹. Evidence that the testator was a victim of the morphine habit was admissible as a basis for expert testimony⁶⁰. Questions relating to general capacity put to an old acquaintance who was in a position to judge are admissible⁶¹. Facts referring to a particular time, even where the time antedates the making of the will are permissible⁶²; so a fact that a provision of a will is contrary to natural justice may be admitted⁶³. In case where a will is contested evidence of bad reputation of an executor is admissible when accompanied with a showing of circumstances sufficient to justify an inference that the testator knew at the date of the will that his character was bad⁶⁴, and contestants may introduce evidence relating to the capacity of the testator at the time to plan and execute such a paper as the purposed will⁶⁵. Contestants

56. *Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627.

57. *Rice v. Rice*, 53 Mich. 432, 19 N. W. 132.

58. *Prentis v. Bates*, 88 Mich. 567, 50 N. W. 637; *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731.

59. *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

60. *Buxton v. Emery*, 139

Mich. 341, 102 N. W. 948.

61. *Porter v. Throop*, 47 Mich. 313, 11 N. W. 174.

62. *Conely v. McDonald*, 40 Mich. 150.

63. *Henrich v. Saier*, 124 Mich. 86, 82 N. W. 879.

64. *McGinniss v. Kempsey*, 27 Mich. 363.

65. *McGinniss v. Kempsey*, 27 Mich. 363.

may introduce testimony of witnesses to observations made before and after the will was made⁶⁶. Evidence of mental unsoundness on the part of a brother or sister of the person whose competency is in question is admissible as to show an hereditary taint of insanity in such person⁶⁷. Testimony as to insanity at the time as well as at the time prior or subsequent thereto is admissible⁶⁸. In a case where testator had grave doubts of paternity of son evidence of insane delusions is admissible⁶⁹. Proponent's admissions that she had considered testatrix insane, are admissible⁷⁰. The introduction of testimony tending to show state of mind of testator at the time of making will is not made inadmissible by showing senile decay⁷¹. The opinions of men skilled in medical science, in other words, physicians, are admissible in evidence, though not founded upon their own personal observation of the facts of the particular case, provided that such opinions are based either upon facts observed and stated by other witnesses who knew them, or upon a state of facts assumed for the purpose as a hypothetical case, and again in the case of such professional witnesses as well as that of unprofessional witnesses—who are allowed to give their opinions only from personal observation—the facts upon which the opinion is founded must be stated⁷². A physician may give opinion of testator's mental capacity at the time when he made the

66. *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372.

67. *Prentiss v. Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153.

68. *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911.

69. *O'Dell v. Goff*, 149 Mich. 152, 10 L. R. A. (N. S.) 689, 112

N. W. 736.

70. *Leffingwell v. Bettinghousen*, 151 Mich. 512, 115 N. W. 721.

71. *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911.

72. *Kempsey v. McGinniss*, 21 Mich. 123, *McHugh v. Fitzgerald*, 103 Mich. 21, 81 N. W. 354.

examination which was on the same day the testator made his will⁷³. The following question was put, in a will contest case, on cross-examination to the attorney who drew the will, "and you did not suggest to testatrix that she was giving all her household belongings and pictures to the library association?" This question was deemed admissible⁷⁴.

§352. —Undue Influence.

The scope of investigation as to admissibility of evidence in a contest will case on the ground of fraud or undue influence is very broad, and the inquiry is permitted to enter into the whole chain of circumstances attending the preparation of the will, for the transaction must be deemed to embrace all the immediate preliminary acts and proceedings⁷⁵. It has always been said that inquiries concerning alleged frauds could not be limited by arbitrary rules, but that proof may be given of any matter at all tending to throw light upon the affair⁷⁶. Facts, bearing on domestic relations, as far as they have pertinency whatever on the question of undue influence are admissible and in order to be so they must be more readily shown by recent than by past relations and the testimony of fresh events is less likely to be manufactured than that of transactions long past⁷⁷. All facts which contribute to alienate the parental feelings of the testator and create in his mind a dislike for his children are admissible⁷⁸, and all questions

73. *Longe v. Wiegand*, 125 Mich. 647, 85 N. W. 109.

74. *Spencer v. Terry's Estate*, 133 Mich. 39, 94 N. W. 372.

75. *Beaubien v. Cicotte*, 12 Mich. 459.

76. *Beaubien v. Cicotte*, 12 Mich. 459.

77. *Pierce v. Pierce*, 38 Mich. 412.

78. *White v. Bailey*, 10 Mich. 155.

the object of which is to prove the ill-treatment of the testator in his old age by his children are admissible⁷⁹. Questions to prove the wife's abuse of the husband are admissible where a will disinherited the testator's relatives in favor of his wife and her relatives⁸⁰, so are questions permissible that the testator made a complaint of any importunities on the part of his relatives⁸¹. Evidence is admissible to rebut a natural presumption⁸². Facts showing acts of undue influence at a date subsequent to the execution of the will are admissible, in connection with other facts and circumstances in support of the charge of undue influence exerted at the earlier date⁸³. In connection with other facts as bearing on the question of undue influence, facts may be admitted to show provisions of the will to be against natural justice⁸⁴. It is error to exclude proof of relations between daughter and testatrix⁸⁵. Evidence showing the exclusion of children from sick room are admissible⁸⁶. In a contest case it is permissible on the part of the contestants to show that papers of incompetency were filed⁸⁷. The conduct of the proponent and of those who were active in her interest in having the will executed, and the condition of the testatrix at that time, as well as the execution of two former wills, may be shown

79. *White v. Bailey*, 10 Mich. 155.

80. *Beaubien v. Cicotte*, 12 Mich. 459.

81. *Beaubien v. Cicotte*, 12 Mich. 459.

82. *White v. Bailey*, 10 Mich. 155.

83. *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731; *Waltz v. Waltz*, 127 Mich. 607, 86 N. W. 1030; *Porter v. Throop*,

47 Mich. 313, 11 N. W. 174; *Haines v. Hayden*, 95 Mich. 349, 54 N. W. 911.

84. *Henrich v. Saier*, 124 Mich.

86, 82 N. W. 879.

85. *Page v. Beach*, 134 Mich. 51, 95 N. W. 981.

86. *Waltz v. Waltz*, 127 Mich. 607, 86 N. W. 1030.

87. *Zibble v. Zibble*, 131 Mich. 655, 92 N. W. 635.

as bearing upon the question of undue influence⁸⁸. In a case where a will is contested on account of incompetency and undue influence, questions relating to his aiding or failing to aid his immediate relations are pertinent⁸⁹.

§353. *Res Gestae*. Declarations.

Res gestae means the thing done, and all declarations made simultaneously with the fulfilment or non-fulfilment, or with the doing and consummation of the transaction, constituting the main fact, and including what was done and what was said, are admissible, for the reason that most generally that which was done and said, are so closely related, that neither can be detached without leaving the residue fragmentary and distorted. The general rule may be laid down that all facts, so closely and intimately connected with the main facts in issue as to form, and to be a part of the same transaction or subject matter, are relevant to each other and therefore admissible as evidence. Thus, it is clear that what was said, *at the time*, by the parties to the grant, indicating the particular individual for whose benefit the grant was intended to be made, is admissible, on the ground that what was then said constituted a part of the *res gestae*⁹⁰; and is only the intention declared at the time the transaction under consideration takes place, which, as part of the *res gestae*, can bind or affect others⁹¹.

§354. —Execution.

Part of the *res gestae* is that which was said by the

88. *Sullivan v. Foley*, 112 Mich. 1, 70 N. W. 322.

89. *Busch v. Delano*, 113 Mich. 321, 71 N. W. 628.

90. *Stockham v. Williams*, 1 Doug. 546.

91. *Dawson v. Hall*, 2 Mich. 390.

grantor at the time the deed was drawn⁹². The *res gestae* in a case where the instructions for executing a will contemplated that the attending physician should be sent for to attest it, necessarily embrace this act as one of the steps actually taken, and it is clear that what message was sent or received is therefore admissible⁹³. Declarations of testatrix as to the contents of a later will are admissible⁹⁴; so declarations which show a change of mind in the testator are admissible⁹⁵. Statements made by testatrix after the date of the will that she had destroyed the will are permissible⁹⁵. In the probating of lost wills declarations are admissible to rebut presumption of revocation⁹⁶.

§355. — Capacity.

In contested will cases the general rule is that not only all declarations forming a part of the *res gestae*, but declarations of the testator made both before and after the making of the will may be admitted for the purpose of showing the state of mind of the testator, and the subsequent declarations are admissible for the reason that the condition of mind ascertained at a date subsequent to the execution of the will may be presumed to have existed at a prior time⁹⁷. The court said: "There cannot well be a middle ground between the doctrine held in some cases that, to render subsequent declarations admissible they must be made so near the date of the will as to be part of

92. *In re Dowell's Estate*, 152 Mich. 194, 115 N. W. 972.

93. *Beaubien v. Cicotte*, 12 Mich. 459.

94. *In re Lambie's Estate*, 97 Mich. 49, 56 N. W. 223.

95. *Lawyer v. Smith*, 8 Mich.

411, 77 Am. Dec. 460.

96. *Ewing v. McIntyre*, 141 Mich. 506, 104 N. W. 787.

97. *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911.

the *res gestae*, and the rule to be deduced from other cases⁹⁸, that such declarations are admissible in any case where the fair inference, from all the circumstances, is that they truly represent the testator's state of mind at the time the will was made"⁹⁹. To disprove evidence tending to show that testatrix had lost the power of speech, evidence of a witness who was visiting testatrix right before the will was made is admissible¹⁰⁰. Evidence to show eccentric conduct and talk is permissible¹⁰¹. In connection with other facts as tending to prove mental derangement, facts showing sudden irritability, moroseness, and unprovoked profanity by which a complete and radical change of disposition was indicated are admissible¹⁰².

§356. — Undue Influence.

The general rule of the production of evidence obtains in cases of undue influence that declarations made by the testator before or after the making of the will are admissible¹⁰³, for the purpose of showing the condition of his mind, but not to establish the fact of undue influence¹⁰⁴. However, where under the circumstances of the undue influence a change takes place in the relations of the par-

98. *Beaubien v Cicotte*, 12 Mich. 439; *Harring v. Allen*, 25 Mich. 505; *Cook v. Perry*, 43 Mich. 626, 5 N. W. 1054; *Porter v. Throop*, 47 Mich. 313, 11 N. W. 174. *In re Levevre's Estate*, 102 Mich. 568, 61 N. W. 3.

99. *Haines v. Hayden*, 95 Mich. 332, 104 N. W. 787.

100. *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354.

101. *Prentiss v. Bates*, 93 Mich.

234, 17 L. R. A. 494, 53 N. W. 153, S. C. 88 Mich. 567, 50 N. W. 673.

102. *Conely v. McDonald*, 40 Mich. 150.

103. *O'Dell v. Goff*, 153 Mich. 643, 117 N. W. 59; *Roberts v. Bidwell*, 136 Mich. 91, 98 N. W. 1000; *Zibble v. Zibble*, 131 Mich. 655; 92 N. W. 348; *Beaubien v. Cicotte*, 12 Mich. 459.

104. *Zibble v. Zibble*, 131 Mich. 655, 92 N. W. 348.

ties, subsequent declarations made by the testator are rendered inadmissible¹⁰⁵. Declarations of testator showing state of mind towards legatees are admissible¹⁰⁶. Statements by testator that his wife gave him no peace, and threatened to leave him if he did not deed her his property are permissible¹⁰⁷.

§357. Irrelevancy. Inadmissibility.

Irrelevancy is that quality of evidence which makes it incompetent, immaterial, impertinent and unavailable to establish any fact or facts in issue and though there are facts which may be logically pertinent, yet they are not legally. The doctrine of irrelevancy has its source in the maxim *res inter alios acta alteri nocere non debet*, i.e., a thing done between others ought not to injure, as expressed by jurists. The general rules¹⁰⁸ of irrelevancy have application in will cases the same as in others.

§358. — Execution.

Contestants in a will case endeavored to show that a witness had proved a claim against the estate, but this evidence was decided to be inadmissible¹⁰⁹. In a case where evidence is offered in a will contest relating to the charac-

105. *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911.

106. *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628.

107. *Zibble v. Zibble*, 131 Mich. 655, 92 N. W. 348.

108. The more general rules are:

First, all facts not directly in issue nor relevant to the issue

are inadmissible.

Second, all facts connected with another by way of cause and effect and necessarily logically relevant are not always admissible.

Third, character, hearsay and opinion evidence in general are irrelevant and inadmissible.

109. *Frazer v. Jennison*, 42 Mich. 206, 3 N. W. 882.

ter of a legatee as to his drinking habits, on the hypothesis that the testator would be less likely to leave him a legacy, it is manifest that such evidence is not permissible, for the reason that no offer is made to show that testator had knowledge of the fact, and the question is not confined to the period of testator's life¹¹⁰. Evidence, in a proceeding to establish a lost will, that the child of the proponent was born within a few weeks of her marriage is inadmissible¹¹¹.

§359. — Capacity.

The general rule is well settled that declarations of the testator, whether made before, or after the will, relating to its dispositions and in opposition thereto, are admissible, bearing upon the mental capacity; but they are not admissible for the purpose of establishing the distinct fact of undue influence¹¹². Declarations and conduct of testatrix after a will is made are as said before often admitted to prove lack of testamentary capacity, but this is based upon the theory that the subsequent condition may be presumed to have existed when the will was made, yet in cases where the presumption is forbidden, all evidence of such a nature is inadmissible¹¹³. It is proper not to admit declarations made by a testator after the execution of the will, tending to show that he then entertained an insane delusion against a relative, for the reason that the transactions to which they relate were subsequent to the will¹¹⁴. Declaration

110. *In re Moore's Estate*, 146 Mich. 463, 109 N. W. 858.

111. *Rickabus v. Gott*, 51 Mich. 227, 16 N. W. 384.

112. *Harring v. Allen*, 25 Mich. 505; *Pierce v. Pierce*, 38 Mich.

420.

113. *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731.

114. *In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372;

made by testator that he regrets making a particular bequest is inadmissible¹¹⁵. It is manifest that on the contest of a will for mental incapacity of the testator evidence of the following character is inadmissible:

First, statements made by a legatee before the decease of the testator to the effect that he was crazy.

Second, testimony given by a witness to the effect that on an occasion not long prior to testator's death a messenger came to a partner of the witness with a request that the partner go to decedent's boarding house, and draft a will for him and further testimony was given by the witness in which he said that his partner declined to go, and gave as a reason that he did not consider testator capable of making a will. All this evidence was clearly hearsay.

Third, acts or statements of deceased, the effect of which tend rather to show that he was irritable than incompetent¹¹⁶. Letters showing friendly relations with a brother are not admissible many years afterward as tending to show that the writer had so lost his natural affection as to indicate insanity; and affectionate letters to and from other relatives, equally remote, to whom, however, he had left bequests, though they may not be strictly inadmissible, may be properly excluded¹¹⁷. It is clear that testimony relating to erratic conduct of testatrix is inadmissible to show insanity or incapacity¹¹⁸,

Haines v. Hayden, 95 Mich. 332, distinguished.

115. Frazer v. Jennison, 42 Mich. 206, 3 N. W. 226.

116. *In re Lefevre's Estate*, 102

Mich. 568, 61 N. W. 31.

117. Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882.

118. Prentiss v. Bates, 88 Mich. 507, 50 N. W. 637.

so is evidence not permissible, purporting the fact that a sister of the testatrix had been confined in an asylum, for the reason that no showing was made that the insanity was hereditary¹¹⁹. Where the question of the mental competency of a man seventy-nine years old was in issue as to the making of his will, evidence is inadmissible to show that nine years before making the will he had during a period of illness, delusions, from which, however, subsequently he had fully recovered¹²⁰. Again where a testator made a will in 1890 and a codicil in 1901, testimony by a physician that he treated the testator for urethritis in 1890 is not permissible on the ground of its remoteness¹²¹. Testimony is inadmissible to show that belief in spiritualism affords evidence of insanity, neither is testimony admissible to show the truth or falsity of spiritualism¹²². It is proper to exclude evidence on the part of an expert witness from explaining circumstances¹²³. The opinions of non-expert witnesses, who testify to no facts or sayings inconsistent with sanity, are inadmissible when permitted to state that in their opinion the testator was incompetent¹²⁴. It is hearsay evidence and prejudicial error to permit the admission of testimony by a witness for the contestants in which she states what her husband told her with reference to the intention of the proponent to keep them away from the testator¹²⁵. It is clear that evidence

119. *Prentis v. Bates*, 88 Mich. 507, 50 N. W. 637.

120. *Hibbard v. Baker*, 141 Mich. 124, 104 N. W. 399.

121. *In re Morse's Estate*, 146 Mich. 463, 109 N. W. 858.

122. *O'Dell v. Goff*, 149 Mich. 152, 10 L. R. A. (N. S.) 980, 112

N. W. 736.

123. *O'Dell v. Goff*, 149 Mich. 152, 10 L. R. A. (N. S.) 980, 112 N. W. 736. See *Lewis v. Arbuckle*, 16 L. R. A. 677 and notes.

124. *Blackman v. Andrews*, 150 Mich. 322, 114 N. W. 218.

125. *Hurton v. Hurton*, 113 Mich. 634, 71 N. W. 1078.

is inadmissible to show either lack of capacity or undue influence by testimony that one who formerly lived in the family of testator was without means, and therefore a more natural object of bounty than those who were legatees in the will¹²⁶. The opinion of a scrivener who drew the will as to the question whether or not undue influence was exercised is not permissible¹²⁷, neither is evidence as to the grounds upon which divorce was granted admissible to show undue influence¹²⁸. Evidence, the purpose of which is to prejudice the jury, is inadmissible¹²⁹. Testimony relating to ancient scandals is irrelevant and therefore inadmissible to the question of undue influence, especially, where they concern the relations of a husband with his wife before marriage¹³⁰.

§360. Preponderance of Evidence.

A preponderance of evidence is a fair weight of testimony¹³¹, in other words, it is not a technical term, but means such evidence as, when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury. It does not mean necessarily that a greater number of witnesses shall be produced on the one side or the other, but that upon the whole evidence the jury believe the greater probability of the truth to be upon the side of the party having the burden of proof or the affirmative of the issue¹³². The amount of evidence pro-

126. *In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372.

127. *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354.

128. *In re Shepardson's Estate*, 53 Mich. 106, 18 N. W. 575.

129. *Rice v. Rice*, 53 Mich.

432, 19 N. W. 132.

130. *Pierce v. Pierce*, 38 Mich. 412.

131. *Moriarity v. Moriarity*, 108 Mich. 249, 65 N. W. 964.

132. *Hoffman v. Loud*, 111 Mich. 158, 69 N. W. 231; *Stroud*

ponent must produce must be measured by the standards that, before resting, he is not only bound to make out a *prima facie* case on the question of soundness of mind, but from the necessity of making out such a case on that point, he is bound to the production of some other evidence of testamentary capacity than is furnished by the legal presumption¹³³. In a lost will the degree of proof is too high for the proponent to maintain the issue by a clear and unquestionable preponderance of evidence¹³⁴. There is a maxim which declares that all evidence must be weighed according to the proof it was in the power of one side to have produced, and in the power of the other side to have contradicted¹³⁵, and the rule is well settled that for the purpose of determining the effect of the testimony of a witness, the evidence produced in direct and cross-examination must be taken and weighed together¹³⁶.

In general it may be said that the rule for preponderance of evidence is the same in will cases as in other civil cases and it ought to be of such a nature that a will ought not to be overturned without reasons that are intelligent to the common sense of mankind¹³⁷.

§361. — Execution.

In cases relating to the execution of wills, the subscribing witnesses' attestation when proved is *prima facie* evidence that all was done as it should be¹³⁸. It is clear that

v. C. & W. M. Ry. Co., 67 Mich. 384, 34 N. W. 712.

133. Aiken v. Weckerley, 19 Mich. 482; Taff v. Hosmer, 14 Mich. 309.

134. *In re* Stockdale's Estate, 157 Mich. 593.

135. Wallace v. Harris, 32

Mich. 380.

136. Maxwell v. Bay City Bridge Co., 46 Mich. 278, 9 N. W. 410.

137. Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882; Ewing v. McIntyre, 141 Mich. 506, 104 N. W. 787.

138. Abbott v. Abbott, 41

prima facie evidence showing capacity is not overcome by proof of weakness¹³⁹. Neither does the weight and sufficiency of evidence depend upon the recollection of a subscribing witness¹⁴⁰. To probate a lost will, all that is necessary to establish the will is preponderance of evidence, and the same rule applies in will cases as in other civil cases¹⁴¹. In case of the revocation of a will, if there is sufficient evidence that it ever existed, the non-production of an alleged revoking will is immaterial in contesting a proceeding to prove a former one¹⁴².

§362. — Capacity.

The general doctrine as to the weight of evidence to show testamentary capacity is that where the testimony established the testator's power to be such that he understood substantially the nature of the act, the extent of his property, his relations to others who might or ought to be objects of his bounty, and the scope and bearing of the provisions of his will, and had sufficient active memory to collect in his mind, without prompting, the ele-

Mich. 540, 2 N. W. 810.

139. O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105.

Execution evidence sufficient: Cheever v. North, 106 Mich. 390, 37 L. R. A. 561, 58 Am. St. Rep. 499, 64 N. W. 455.

Reference that testator was competent from facts existing at time of execution: *In re Sullivan's Will*, 114 Mich. 189, 72 N. W. 135.

Evidence sufficient for probate: Abbott v. Abbott, 41 Mich. 540, 2 N. W. 810.

All subscribing witnesses need

not be sworn: Abbott v. Abbott, 41 Mich. 540, 2 N. W. 810.

Evidence that a will is written on one side of two pieces of paper as proof of forgery: Lamb v. Lippincott, 115 Mich. 611, 73 N. W. 887.

Evidence as to execution insufficient: Blackman v. Andrews, 150 Mich. 322, 114 N. W. 218.

140. Abbott v. Abbott, 41 Mich. 540, 2 N. W. 810.

141. Ewing v. McIntyre, 141 Mich. 506, 104 N. W. 787.

142. Stevens v. Hope, 52 Mich. 65, 17 N. W. 698.

ments of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and was able to form some rational judgment in relation to them. Thus, where the testimony showed that testator possessed the power to buy and sell, to give deeds and releases, to make gifts by delivery, the evidence was sufficient to establish testamentary capacity, but the lack of average mental intelligence does not show incapacity¹⁴³. An order made in probate court adjudging a man incompetent to have the care of his property and appointing a guardian for him, is not *prima facie* evidence that he lacks testamentary capacity¹⁴⁴. It is manifest that the extent of opinion testimony, under the rule that the opinion of a witness upon the question of the competency of a testator is admissible only when it appears that the witness was sufficiently acquainted with him to be able to form an opinion¹⁴⁵, must depend upon the familiarity of the witness with the testator, the character of the disqualification, the nature and number of extraordinary circumstances detailed, and proximity to the act involved in point of time¹⁴⁶. Taken as a whole, they should move the judicial discretion of the trial judge, by apprising him that the evidence may fairly doubt the competency of the person upon reasonable grounds¹⁴⁷, and this discretion must be carefully exercised¹⁴⁸. In case where the will

143. *Hoban v. Piquette*, 52 Mich. 346, 17 N. W. 797.

144. *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545.

145. *White v. Bailey*, 10 Mich. 161; *Beaubien v. Cicotte*, 12 Mich. 459; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Kempsey v. McGinniss*, 21 Mich. 123; *Prentiss*

v. Bates, 88 Mich. 367, S. C. 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153.

146. *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105.

147. *Prentiss v. Bates*, 93 Mich. 242, 17 L. R. A. 494, 53 N. W. 153; *Lynch v. Doran*, 95 Mich. 395, 54 N. W. 882.

148. *Rice v. Rice*, 53 Mich.

was the product of an insane delusion and the testator entertained a feeling of aversion amounting to a hatred toward his mother and this feeling actuated him when he made the will, all of which was substantially proved by competent testimony, the evidence is sufficient to establish the insane delusion¹⁴⁹. It is essential that proof of the kind of imbecility of mind as disqualifies one from making a will should be shown, if it does not amount to idiocy, by the testimony of witnesses who have had personal knowledge of the facts within twenty years before the will was executed¹⁵⁰.

§363. — Undue Influence.

In contest cases on the ground of undue influence in the procurement of a will it must be established by a preponderance of the evidence only¹⁵¹. "The rule of law which," the court said, "excludes all presumption of undue influence over a person of sound mind requires him who

432; *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105.

149. *In re Mansbach's Estate*, 150 Mich. 348, 114 N. W. 65.

150. *Hoban v. Piquette*, 52 Mich. 346, 17 N. W. 797.

Evidence sufficient to show capacity: *O'Dell v. Goff*, 153 Mich. 643, 10 L. R. A. (N. S.) 989, 117 N. W. 59; *Clark v. Ulrich*, 153 Mich. 719, 117 N. W. 829; *In re Hoffman's Estate*, 151 Mich. 595, 115 N. W. 690; *Spencer v. Terry's Estate*, 133 Mich. 30, 94 N. W. 372; *In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372; *Hawes v. Hayden*, 95 Mich. 332, 55 Am. St. Rep. 566, 54 N. W. 911; *Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627 (writing his

own will). *Maynard v. Vinton*, 59 Mich. 130, 60 Am. Rep. 210, 26 N. W. 401.

Evidence insufficient to show incapacity: *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731; *In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372; *Reichert v. Reichert*, 144 Mich. 295, 107 N. W. 1057; *Hibbard v. Baker*, 141 Mich. 124, 104 N. W. 399; *Rivard v. Rivard*, 100 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 631; *Prentiss v. Bates*, 88 Mich. 567, 50 N. W. 637; *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

151. *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628; *Maynard v. Vinton*, 59 Mich. 153.

asserts that the instrument ought not to have any force or effect because it was obtained by undue influence, to prove affirmatively that it was so obtained. How can he do this unless he is permitted to show the previous relations within a reasonable period of time, which existed between the parties? This proof must be made out in most if not in all instances by circumstantial evidence; by proof of facts and circumstances which, standing alone, might prove nothing, but when taken together, and in relation to other facts might tend to satisfy a jury of the existence of the principal fact of undue influence"¹⁵². Not only may fraudulent influence be inferred from circumstances, but undue influence may be exercised through fraud¹⁵³.

§364. Extrinsic Testimony to Aid Construction.

In general the terms of every document must, in the absence of all parol testimony, be construed in their

152. *In re* Shepardson's Estate, 53 Mich. 106, 18 N. W. 575.

153. *Dobson v. Dobson*, 142 Mich. 586, 105 N. W. 1110.

Evidence sufficient to show undue influence: *Lyon v. Dader*, 111 Mich. 340, 69 N. W. 654; *In re* Seymour's Estate, 111 Mich. 203, 69 N. W. 494; *Rivard v. Rivard*, 100 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681; *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 506, 54 N. W. 911.

Evidence insufficient to show undue influence:

Question of affections, see *Blackman v. Andrews*, 156 Mich. 325, 114 N. W. 218.

Undue influence not established from an unequal distribution of property: *Russell v. Carpenter*,

153 Mich. 170, 116 N. W. 989.

In re Dowell's Estate, 152 Mich. 194, 115 N. W. 972.

Undue influence will not be inferred from opportunity: *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 731.

Physical weakness not sufficient to establish undue influence where mental faculties are strong, *In re* Hoffman's Estate, 151 Mich. 595, 115 N. W. 690.

In re Morse's Estate, 146 Mich. 463, 109 N. W. 858; *Kneisel v. Kneisel*, 143 Mich. 384, 106 N. W. 1114; *Waters v. Reed*, 129 Mich. 131, 88 N. W. 394; *Peninsular Trust Co. v. Barker*, 116 Mich. 333, 74 N. W. 508; *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887.

primary sense, unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, they must be understood in some other and peculiar sense. The general rule is that if the language be technical or scientific and be used in a matter relating to the art or science to which it belongs, its technical or scientific use must be considered its primary meaning, but if the expressions relate or have reference to the common transactions of life, they will be interpreted and accorded their plain, ordinary and popular meaning¹⁵⁴. The rule, respecting the admissibility of ex-

154. The rules for the interpretation of wills laid down by Sir J. Wigram in his able treatise are as follows:

I. A testator is always presumed to use the words, in which he expressed himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case, in which he thus appears to have used them, will be the sense in which they are to be construed.

II. When there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, or intention to use them in such popular or sec-

ondary sense be tendered.

III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which *with reference to these circumstances*, they are capable.

IV. When the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the court of the proper meaning of the words.

V. For the purpose of determining the object of a testator's bounty, or the subject of disposi-

trinsic evidence to effect that which is in writing is that parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a valid testamentary instrument¹⁵⁵.

§365. — In General.

The general principle is well settled that the words of a testator, like that of other persons, naturally refer to the circumstances, about him at the time, and that in order to have his outlook and all reasonable means of explanation of his words, not in addition or contradiction to them, but to disclose his use of them, a knowledge of these circumstances is essential. There should be no failure to

tions, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of dispositions, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is that of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words.

VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the

testator intended, and the will except in certain special cases will be void for uncertainty.

VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: Where the object of a testator's bounty, or the subject of disposition (i. e., person or thing intended is described in terms, which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator.

155. *Tuxbury v. French*, 41 Mich. 7, 1 N. W. 904.

distinguish between the class of facts surrounding the testator at the time of making his will, and to which he may be supposed to refer in the way he takes to describe how he wills, and facts of another period; or facts of a nature contrary or repugnant to the sense of his words, or of such force as to introduce additional expressions, for extrinsic evidence is admissible to explain what is written, but not to alter or destroy it¹⁵⁶. Under the circumstances, what is called for is that the court shall be placed in the situation the testator occupied when he made the will, and in that situation of advantage read the words as written, and then interpret and apply them, unless there is such an uncertainty that the law is fairly baffled¹⁵⁷. Parol evidence cannot be introduced for the purpose of supplying a description of land which was omitted from a devise¹⁵⁸, neither is it admissible to show what occurred between the parties after the execution of the deed, and before the execution of the will¹⁵⁹.

§366. — To Show Intention.

The general principle is well established that oral evidence cannot be received to explain the intent, except as it may bring before the court such circumstances surrounding the making of the will as may be necessary to an understanding of the terms employed¹⁶⁰.

156. *Tuxbury v. French*, 41 Mich. 283, 1 N. W. 159.

157. *Tuxbury v. French*, 41 Mich. 283, 1 N. W. 159.

158. *Crooks v. Whitford*, 47 Mich. 283, 11 N. W. 159.

159. *Pittman v. Burr*, 79 Mich.

539, 44 N. W. 951.

160. *Waldron v. Waldron*, 45 Mich. 350, 7 N. W. 894; *Eberts v. Eberts*, 42 Mich. 404, 4 N. W. 172; *Turner v. Burr*, 141 Mich. 106, 104 N. W. 379.

§367. — Ambiguity.

It is manifest that when there is no ambiguity on the face of a will, it is not admissible by extrinsic evidence to seek to raise an ambiguity, and therefore on the strength thereof to limit or qualify the construction of the language actually used so as to give effect to some conjectured probable purpose of the testator which he has failed to express. If this method were permissible it would not be putting a construction upon the will made by him, but making a new one of quite a different purport¹⁶¹.

§368. — Copy.

It may be stated that where executors fail to produce a will after due notice, the will may be provable by copy and for the purpose of showing that the copy is a correct draft of the will, parol evidence may be introduced, and its execution may be established in the same manner¹⁶².

161. *Kinney v. Kinney*, 34 Mich. 250; *Adams v. First Baptist Church of St. Charles*, 148 Mich. 140; 11 L. R. A. (N. S.) 509, 111 N. W. 757; *Defriese v.*

Lake, 109 Mich. 415, 32 L. R. A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385.

162. *Keagle v. Persell*, 91 Mich. 618, 52 N. W. 58.

PART TWO.
FORMS OF WILLS.

SOME REMINDERS WHEN DRAFTING WILLS.

No. 1. Remember that the expressed intention of the testator cannot take effect when in conflict with positive rules of law.

No. 2. Remember that the testator must make some definite, clean cut disposition of his property which can be enforced in accordance with the positive rules of law.

No. 3. Remember that the designation of the beneficiaries must conform to the rules of certainty.

No. 4. Remember that the subject matter of the gift must conform to the rules of certainty.

No. 5. Remember the Court's construction of words of inheritance and of estates.

No. 6. Remember statutes relating to legacies to subscribing witnesses, to children born after making will, to omission of child, to issue of deceased legatees, to widow's right of election, and the rules relating thereto, etc.

No. 7. Remember to make some provisions expressing disinheritance, where desired.

No. 8. Remember that ownership of his property ceases with testator's death.

No. 9. Remember that the title, both legal and equitable, must immediately pass to some one else.

No. 10. Remember that in creating a trust, it must point out with sufficient definiteness not only the trust property, but its object and purpose.

No. 11. Remember that a trust for accumulations is not favored in law.

No. 12. Remember the rule suspending the power of alienation.

No. 13. Remember the rules of perpetuity.

No. 14. Remember that an annuity ought not to be charged against the entire estate.

No. 15. Remember that as a general rule restraints upon marriage are not favored in law.

No. 16. Remember the statutes relating to the requisites and the formal execution of wills.

COMPOSITE WILL.

- A. Testamentary Clauses.
- B. Imprimis Clauses.
- C. Estates Clauses.
- D. Annuity Clauses.
- E. Bequest Clauses.
- F. Devise Clauses.
- G. General Provision Clauses.
- H. Residuary Clauses.
- I. Contest Clauses.
- J. Power Clauses.
- K. Executor's Appointment Clauses.
- L. Attorney's Appointment Clause.
- M. Revocation Clause.
- N. Testimonial Clauses.
- O. Attestation Clauses.

The books afford no suggestion of a composite will. However, it is hoped that this one may be helpful to the busy attorney, for the reason that herein are given all the usual clauses which can be changed, altered, or modified to suit any circumstances. It is not desirable to use any form verbatim since forms are guides and not models.

A. Testamentary Clauses.

No. 1. Testamentary Clause.

I, of, in the county of in the State of Michigan, do make and publish this, my last will and testament, in manner and form following, that is to say:

No. 2. Testamentary Clause.

I, of in the county of in the State of Michigan, for the purpose of making that disposition of my entire estate, real and personal, which I wish to have take effect at my death, do make, publish and revoke all former wills and

testamentary dispositions heretofore at any time by me made.

No. 3. Testamentary Clause.

I, of, in the county of, in the State of Michigan, do make this, my last will and testament and declare my intention and purpose herein and hereby to dispose of all the lands, personal estate and property of every kind which I may own at the time of my decease or which I may have power to dispose of under the authority given to me by the last will and testament of my father and by an ante-nuptial settlement (*or as the case may be*) made between myself of the first part and of the second part (*or as the case may be*) or by all or any other instruments or authority whatsoever.

No. 4. Testamentary Clause.

I, do make, publish and declare the following as and to be my last will and testament:

No. 5. Testamentary Clause.

Be it remembered, that I, of, in the State of Michigan, merchant (*or as the case may be*), being of sound, disposing mind and memory, do make and ordain my last will and testament, in manner following, viz:

No. 6. Testamentary Clause.

Know all men by these presents:

That I, of, in the county of, and State of Michigan, being in ill health (*or good health, as the case may be*), and of

sound and disposing mind and memory, do make and publish this, my last will and testament, hereby revoking all former wills by me at any time heretofore made.

No. 7. Testamentary Clause.

I,, wife of....., of, do by this my writing, purporting to be my last will and testament, dispose of my estate, both real and personal, pursuant and according to the authority to me given and reserved in and by a deed of settlement (*or otherwise, as the case may be*), made and executed on my marriage (or, in contemplation of my marriage), with my husband, the said and bearing date the day of, A. D. 19...., by and between the said and, and, trustee (*here set forth the date and parties to the settlement*).

And by virtue of said deed, and of all other powers and authorities whatsoever, to be given and reserved, in manner as follows, viz:

No. 8. Testamentary Clause.

In the name of God, amen:

I,, of the County of, in the State of Michigan, farmer (*or, as the case may be*), being weak in health of body (*or in perfect health as the case may be*), and of sound mind, memory and understanding, but, considering the uncertainty of this transitory life, do make and publish this, my last will and testament, in manner and form following, to wit:

No. 9. Testamentary Clause.

I,, of, in the County of, in the State of Michigan, do

make and publish this, my first as well as last will and testament:

I direct, that my body be decently interred in the burial ground of church (*or as the case may be*), in, according to the rites and ceremonies of said church, and that my funeral be conducted in a manner corresponding with my estate and situation in life.

And, as to such world estate as it hath pleased God to entrust me with, I dispose of the same as follows:

B. Imprimis Clauses.

No. 10. Imprimis Clause.

First and principally, I commit, with humble reverence, my soul to the keeping of Almighty God.

No. 11. Imprimis Clause.

First and foremost I thank the Lord Almighty for permitting me to acquire so large a portion of worldly goods.

No. 12. Imprimis Clause as to Payment of Debts, Etc.

I direct that all my debts and funeral expenses shall be paid by my executor hereinafter named.

No. 13. Imprimis Clause as to Payment of Debts, Etc.

I direct my executor to pay all my just debts and funeral expenses and the expenses of settling my estate, including the expense of a simple and suitable monument to my memory.

No. 14. Imprimis Clause as to Payment of Debts, Etc.

I direct all my just debts and funeral expenses to be fully paid and satisfied by my executors, hereinafter named, as soon as conveniently may be after my decease.

*C. Estate Clauses.***No. 15. Clauses Creating Estate in Fee Simple.**

I give, devise and bequeath unto ,
all of the estate, real and personal and of whatsoever character and wheresoever situate, of which I am seized, to be theirs absolutely and forever.

No. 16. Clauses Creating Estate in Fee Simple.

I give, devise and bequeath all my estate, both real and personal to , his or her heirs and assigns forever.

No. 17. Clauses Creating Estate in Fee Simple.

I give, devise and bequeath to to have and to hold the same to absolutely and forever.

No. 18. Clauses Creating Life Estate.

I give, devise and bequeath to all my estate, both real and personal to have and to hold during his or her actual life.

No. 19. Clause Creating Life Estate With Remainder.

I give, devise and bequeath to all my estate, both real and personal, during her natural life, and after her death to , his heirs and assigns forever.

No. 20. Clauses Creating Estates in Common.

I give, devise and bequeath the following described real estate in and to have and to hold the same to them, their heirs and assigns forever as tenants in common.

No. 21. Clauses Creating Estate in Fee Simple With a Charge.

I give, devise and bequeath unto, all of the estate, real and personal of whatsoever character and wheresoever situated, of which I died seized; to be theirs absolutely and subject only to the charges in favor of hereinafter expressed.

No. 22. Clauses Creating Life Interest in Personalty.

I give and bequeath all my pictures (*or as the case may be*), to my wife,, for life and after her death to my son,, for life and upon his death to his oldest son him surviving.

No. 23. Clauses Creating Life Estate with Reversion to Another.

I give and devise all my real estate, of what nature or kind soever, to my wife, (*or to my friend,*), to be used and enjoyed by her (*or him*) during the term of her (*or his*) natural life; and from and immediately after her (*or his*) decease, I give and devise the same to my friend,, his heirs and assigns, forever.

D. Annuity Clauses.

No. 24. Bequest in the Form of Annuity.

I give and bequeath an annuity of dollars to, for her life, for her sole and separate use; and for this purpose I direct my executors, within months after my decease, to lay out a sufficient portion of my personal estate, in the purchase of such an annuity as aforesaid, in her name, from some incorporated company; but neither she

nor any person claiming under her shall be entitled to claim or accept in lieu or satisfaction thereof the sum which may be required for the purchase of such annuity.

No. 25. Bequest in the Form of Annuity.

I give and bequeath unto my wife,, over and above the estates which are already settled upon her (*situate, etc.*), one annuity or yearly sum of dollars, for and during the term of her natural life, in case she shall so long continue my widow; and I do hereby direct that the same shall be charged upon the interest to arise, accrue, or be paid, as hereinafter is mentioned, from or by the capital to be employed in my trade or business of, which is to be carried on by my said executors, according to the direction hereinafter for that purpose given and contained. And that the said annuity or yearly sum of dollars shall be paid to her, my said wife, by four equal quarterly payments, on, on, etc., in every year, the first payments to begin and be made on such of the said days as shall next happen after my decease. But in case my said wife shall marry again at any time after my decease, then and in such case I revoke the said bequest of the said annuity of dollars hereinbefore given to her, and direct that the same shall from thenceforth cease and determine, etc.

No. 26. Bequest in Form of Annuity.

And I direct that the said annuity of dollars shall be paid clear of all deduction, except by any duty of tax, by equal half-yearly payments, the first payment to be made at the end of six calendar months from my death.

*E. Bequests Clauses.***No. 27. Bequest with Direction to Invest.**

I bequeath to each of my children,, and, the sum of dollars, with interest at the rate of per cent. per annum, from my death till the payment thereof, such interest to be paid half-yearly. And I hereby declare, that if my said daughter,, shall be under twenty-one years at my death, and shall not have married, the legacy hereby given to her shall be retained by my trustee hereinafter named, their executors, or administrators, upon trust, to pay the same to her when she shall attain twenty-one years or marry; and upon trust in the meantime to pay the interest of such legacy to her, and her receipt, notwithstanding her infancy, to be an effectual discharge for the same; and if the said shall not attain twenty-one years or marry, the same legacy shall, upon her death, sink into my residuary estate.

No. 28. Bequest of Debt.

I bequeath to, any debt which, at the time of my decease, shall be owing from him to me, together with any interest then due thereupon.

No. 29. Bequest on Condition.

Whereas the directors of University are now engaged in an effort to enlarge its sphere of action, and give it great efficiency in promoting education, and being desirous, if such effort shall prove successful, of still further enlarging its sphere and efficiency by endowing a professorship of in said university; therefore, I give and bequeath to said (*here*

insert full name), the sum of dollars, to be paid within years after my death, for the purpose of founding and permanently endowing a professorship of in said university; upon condition, however, that the sum of dollars shall, within years from the time of my death, be raised for the purpose of endowing two other professorships, and paying the indebtedness of said university.

No. 30. Bequest in the Event of Death of Legatee.

And if any legatee be now dead, or die before me, I give the legacy intended for him or her to his or her executors or administrators, to be applied as if the same had formed part of the personal estate of such legatee at his or her decease.

No. 31. Bequest to Corporation.

I give and bequeath to (stating the full name of the corporation, or, if not certainly known, describing it), at, the sum of dollars, to be applied to (state what).

No. 32. Bequest of Charity.

..... I order and direct the sum of dollars to be divided as my wife shall think proper, or, in case of her death, as my said son shall think proper, among such of the poor persons resident in, where I now live, as shall happen to be upon my Christmas list, and shall have received a small donation by my order and direct the sum of dollars to be divided or given as my wife shall think proper, to or amongst any poor family or families of the aforesaid

of and of, which shall seem to her to be most deserving of such reward or assistance.

I give to the said the sum of dollars, upon trust to place out the same on government or real securities, at interest, in the name of such persons as he, his executors or administrators, shall think proper, with liberty to the trustees or trustee thereof, for the time being, of transposing the same, to the intent that such trustees or trustee thereof do apply the interest or dividends arising therefrom, for or towards the education of four poor boys, at or in the said school at, aforesaid, to be from time to time nominated by such trustees or trustee for the time being.

No. 33. Bequest of Dress and Ornaments.

I give and bequeath to my wife, absolutely all her trousseau, wearing apparel and linen, and the watches, rings, trinkets, jewels, and personal ornaments usually worn by her, or reputed to belong to her.

No. 34. Bequest of Furniture to Children.

I bequeath to my children who shall be living at the time of my death all (etc., as below), equally to be divided between them; and if any dispute should arise with respect to the division, I authorize my executors to distribute the said effects equally amongst my said children.

No. 35. Bequest of Furniture to Wife.

I give and bequeath to my wife during her life, and so long as she shall remain a widow, the use of all (*state what*). And after her decease or remarriage, I give and bequeath the same to (*name*) absolutely if he (*or she*)

should be living at the decease or remarriage of my wife; but if he (*or she*) should be dead, then to (*several parties may here be named in succession; or, in case the will has directed the testator's property to be sold, and the proceeds held in trust, say:* and after her decease or remarriage I direct my executors and trustees to sell the same, and add the proceeds to the trust-fund, under this my will.)

No. 36. Bequest of Furniture, Etc.

I give and bequeath to (state who) all the household furniture, books, works of art, and other chattels and effects, together with wines, liquors, fuel, house-keeping, provisions and other consummable stores, which shall at my decease be in or about my dwelling house at except (state what).

No. 37. Bequest of Good Will of Business.

I give and bequeath the good-will and benefit of the business of, which I am now carrying on at, and also all my capital and property which shall be employed therein at my decease, and also the leasehold premises situate and being No., at, aforesaid, wherein the said business is now being carried on, for all my term and interest therein, unto my absolutely.

No. 38. Bequest of Jewelry, Plate, Etc.

I give and confirm to my dear wife all the jewels, trinkets, and personal ornaments worn or used by her during my lifetime; and I also give to her all my wines, liquors, and other consummable stores, and all my horses and carriages, for her absolute use and benefit.

I give all my plate and plated articles, books, pictures

and prints unto my said wife, to use and enjoy the same during her life, if she shall so long continue my widow; and from and after her decease or second marriage (whichever shall first happen), to such son of mine as shall first attain the age of twenty-one years.

I give my leasehold dwelling-house, being No. etc., (describing it), and all my furniture and household effects being in or about or appropriated or belonging to the said dwelling house, other than and not being plate or plated articles, books, pictures, or prints, unto my said wife, to occupy the said dwelling-house, and to use and enjoy the said furniture and household effects during her life, if she shall so long continue my widow, she paying the ground rent, and all taxes and outgoings payable in respect of the said dwelling-house, and observing and performing the covenants contained in the lease under which the same is or at my decease shall be held.

And I declare that from and after the decease or second marriage of my said wife (whichever shall first happen), the said dwelling-house, furniture, and household effects shall sink into and form part of my residuary estate.

No. 39. Bequest to Infant.

I bequeath to, of, the sum of dollars; and if the said shall be under twenty-one years when the said legacy shall be payable I direct the said legacy to be paid to his father,, of, etc., to be managed by him at his discretion, for the benefit of his said son, till he shall attain twenty-one years; in such case the receipt of the said to be an effectual discharge for the said legacy.

No. 40. Bequest to Married Woman.

I bequeath to, wife of, the sum of dollars. Said sum shall be for her sole and separate use and benefit, and that her receipt, notwithstanding her present or any future marriage, shall be a valid and effectual discharge of the same.

No. 41. Bequest for the Support of Niece and Children.

I give and bequeath the interest and income of dollars, per cent. loan of, to and, their executors and administrators, for the separate use of my niece,, wife of, so and upon this express trust and confidence, that they, the said trustees, do and shall receive the interest and income to arise therefrom, from and after the day of my decease, and apply the same to and for the maintenance and support of the said, and to the maintenance, support, and education of her children, born and to be born.

And if the said stock shall be redeemed or paid off, then my said trustees shall reinvest the proceeds in such other stock as they shall think best, in their names in trust, and receive and apply the interest and income thence to arise to the like uses and purposes aforesaid and so on as often as any stock held or to be held under this trust shall be paid off, and after the death of the said, then the trustees are to pay over the principal and all unapplied interest to and amongst all and every her children, born and to be born, that shall be alive at the time of her death, in equal parts, and if either of her children, born or to be born, shall be then dead, leaving issue, then

such issue shall take in equal parts the share that his, her, or their parent would have taken if then living.

No. 42. Bequest of Money.

I bequeath to (*name the legatees*), the sum of dollars to be paid to him, or her, within after my death.

No. 43. Bequest of Share Under Another Will.

And whereas, under the will of, I am entitled to a share in his residuary personal estate, I bequeath the said share to

No. 44. Bequest When Made Payable.

I direct that the legacies hereinbefore given to (*naming the legatees*) shall be paid in priority to any other legacy given by my will.

No. 45. Bequest of Disinheritance.

,Whereas, my eldest son, has highly offended and disobeyed me, I therefore give and bequeath unto my said son,, one dollar and no more.

No. 46. Bequests in Trust for Unincorporated Society.

I give and bequeath to and and to their successors forever, the sum of dollars, in trust, for the benefit of such undergraduate students of the collegiate department of the University of, as shall be, or shall from time to time become, members of a literary association or society now organized among said students, and known as the Society, of which society I am a graduate member, to be applied by the said trustees to

educational purposes for their benefit, in manner following (stating the application).

F. Devise Clauses.

No. 47. Devise to Wife.

I give and devise unto my beloved wife,, all my lands or tenement and parcels of ground, situate (giving the testator's precise words, etc.), together with the appurtenances, to hold to her, my said beloved wife,, and her assigns, for and during all the term of her natural life, she paying the taxes thereof and keeping the buildings in tenantable repair.

And I do, moreover, give to my said wife, to her absolute use, the sum of dollars, lawful money of the United States, to be paid to her in three months next after my decease.

And it is my will and meaning, that the provision hereinafter made for my said wife, in manner and form as aforesaid, shall be and shall be deemed adjudged and taken to be in lieu and bar of her dower or thirds or other portion of and in all my estate.

No. 48. Devise to Grandchildren.

I give and devise unto my grandchildren,,, the children of my daughter,, and such other child or children of my said daughter, as may be born of her in lawful wedlock, all my, etc., together with all my land, etc., and all the buildings thereon, etc., to hold the same to them my aforementioned grandchildren, the children of my aforesaid daughter,, and their heirs and assigns, forever, as tenants in common and not assigns, forever, as tenants in common and not as

joint tenants; and I appoint my son,, and his said wife, and the survivor of them, to be my trustees of the said estate, hereby empowering them and the survivor of them, immediately after my decease, to enter upon and manage the same to the best advantage of their said children during the life of my said son and daughter, or the survivor of them.

And in order to preserve that dependence which children ever ought to have upon their parents, I do further order that my said son and daughter, or the survivor of them, shall not be compelled to account to their said children for the profits of said estate during the lives of my said son and daughter; but said trustees shall account to their children, or to such guardian as shall be appointed to them, at such time as they the said trustee shall think proper. And if either of their said children shall dispute the account so by their said parents made, then I give and devise such part of said child's estate to my said daughter and her heirs forever, together with all the rents, issues, and profits that may have been made therefrom.

No. 49. Devise of House and Lot.

I give and devise all my houses or tenements, lands and hereditaments, situate and being at, in the township of, in the said county of, which I purchased of, unto and to the use of my son-in-law,, the elder, his heirs and assigns forever.

No. 50. Devise to a Friend.

In consideration of the love and friendship which I have and bear for and towards him, the said, and also in consideration of the many faithful services he

has for many years last past done and performed for me in and about my affairs, and likewise in recompense for the great care and pains he may be at and put unto in the faithful execution of this my last will and testament, I give and devise unto him, the said, and his heirs, all the rest, residue, and remainder of my real and personal estates whatsoever, goods and chattels, lands, tenements, and hereditaments, both in possession and in reversion, that I shall be possessed of, or any way entitled unto, at the time of my decease (after all my debts and legacies are first paid and satisfied thereout, as aforesaid), to hold and enjoy the same to his own proper use and behoof, and to his heirs and assigns, forever.

No. 51. Devise of Lapse Devises.

Provided, always, and I do hereby direct, that if any of the devisees or legatees in this, my will, named shall die before me, then the said devises and bequests shall not lapse, but in the case of real estate such person and persons as shall be the heirs of the devisee shall take as the devisee would have taken if such devisee had survived and outlived me; and in case of a bequest or personal estate, I will and direct that the same shall pass and go to the children of the legatee, and for want of a child or children of the legatee, then to the next of kin of such legatee in the same manner that such legatee would have taken if such legatee had survived and outlived me.

No. 52. Devise of House and Lands.

And I give and devise all the lands, tenements, and hereditaments, lying and being at or near, in the county of, which I purchased of, and the devisees in the last will

and testament of, deceased, with the appurtenances, to such and the same person and persons, and for such and the same estate and estates, as the tene-ments, farm, and lands, commonly called farm, situate, lying and being, at or near, afore-said, which belonged to my late uncle,, deceased, are by his will given, devised, directed, limited, or appointed.

To the end and intent that the said lands and hereditaments so purchased by me as aforesaid may go along with said messuage, farm and lands, called the farm, and be held and enjoyed therewith, by such and the same person and persons, for such and the same estate and estates, as the said messuage, farm, and lands, called farm, are by my said late uncle's will given, devised, directed, or appointed.

No. 53. Devise to School or College.

I give, etc., unto the said, and to his heirs and assigns forever, all that, etc. Upon this special trust and confidence, nevertheless, that he, the said, and his heirs, shall, from time to time, and at all times hereafter, permit and suffer the directors (or trustees) of school (or college), etc., for the time being, and their successors forever, to receive and take the rents, issues, and profits thereof, which I direct and appoint, shall, from time to time, and at all times hereafter, be paid and allowed for and towards the maintenance and education of a poor scholar of the said school (or college), for and during and until such scholar shall be Bachelor of Arts, or elected Fellow of the House; and then to another poor scholar to be elected and chosen

which scholar shall, from time to time, be nominated, elected, and chosen by the directors (or trustees) of the said college.

No. 54. Devise with Bequest to Executors with Power of Sale.

I direct that all my stock in trade be sold at public vendue, or outcry, for good current money, but not upon credit; and that all the real estate of which I shall die seized or possessed shall be sold by my executors, for its reasonable value, for like current money or on credit, and the amount thereof be secured in such a manner as is usual in like cases, to insure the full and prompt payment thereof. And to effect this, my intention, I do hereby vest in my executors full power and authority to dispose of my real estate in as full and large a manner, in every respect, as I could myself do, if living.

I do direct that the net proceeds of my personal estate, heretofore ordered by me to be disposed of, be divided equally as soon as it can be done, share and share alike, among my said wife and my several children who shall survive me; and that the proceeds of my real estate, if sold on credit, shall be divided in like manner, as soon as they shall come into the hands of my executors.

No. 55. Devise to Executor in Trust With Power of Sale.

I give and devise all my real and personal estate, of what nature or kind soever, to and, the executors of this, my last will and testament, hereinafter nominated and appointed, in trust, for the payment of my just debts and the legacies above specified, with power to sell and dispose of the same, at public or private sale, at such time or times, and

upon such terms, and in such manner as to them shall seem meet. Provided, however, that no part of my real estate as aforesaid shall be sold at public auction until after the expiration of years from the time of my decease.

No. 56. Devise to Trustees for a Life or Lives.

I give, bequeath, and devise all my real and personal estate, of what nature or kind soever, to and, the executors of this, my last will and testament, hereinafter nominated and appointed, in trust, for the payment of my just debts, and the legacies and charges upon the said debts, and the legacies and charges upon the said estate hereinafter specified, to be held and possessed by them, for the purposes aforesaid, for and during the natural life of, of the town of, and state of, and for and during the natural life of, infant son of the said; and after their decease, and the decease of each of them.

I give, bequeath, and devise my said estate to my son,, his heirs and assigns. And I do hereby order and direct, that during the continuance of the said trust estate, as aforesaid, there shall be annually paid out of the net income and profits of the said estate, the sum of to my wife,, in lieu of all dower or right to dower in and to my said estate; the sum of to my son,; and the sum of dollars to my daughter,; and that the rest, residue, and remainder of the said net income and profits shall be divided equally between my said executors, in lieu of compensation for their services in the execution of the said trust.

*G. General Provision Clauses.***No. 57. Provision for Unfortunate.**

I direct my executors to provide for my unfortunate and to procure for him all the comforts which his condition doth or may admit, and to bear the expense thereof, not exceeding dollars a year. And in case he should be restored, then I direct them to apply to his use dollars a year during his life; and if he shall leave lawful issue surviving him, then I direct my executors to pay to such issue the sum of dollars per annum to each child for life. And my executors are directed to set apart from my estate such funds as in their judgment shall be sufficient to defray these annuities; and also, all other annuities bequeathed in my will; which annuities shall stand secured on such funds, exclusively of any of my lands.

No. 58. Provision for Use of Income.

I give and bequeath to my daughter for and during her natural life, the possession, control, management, use, income and profits of the securities and bonds mentioned and described in Schedule A and from said securities and bonds she shall be entitled to receive and to apply to her own use, during her natural life only, the entire income of the said securities, and I direct that my said daughter shall not be required to give any inventory thereof, nor any security for the safe keeping or preservation of the same. Upon the death of my said daughter leaving issue her surviving, I give and bequeath the said securities and bonds, or any securities or property into which the same may have been converted unto such issue, if more than one, share and share alike, the issue of any deceased child to take (*per stirpes*) and not (*per capita*).

No. 59. Provision for Release of Advancements.

I direct that no gifts or advance of moneys, real estate or securities that I may have made during my life time to either of my said, or, shall be counted as a part of my estate or charged against the children to whom such gifts or advances may have been made; and I release and absolutely discharge each of my said children and, the representatives of my deceased, of and from all debts which he or she or they may owe me or may be construed to owe me at the time of my decease.

*H. Residuary Clauses.***No. 60. Residuary Clause.**

And all the rest, residue, and remainder of my estate and effects, whatsoever and wheresoever, and of what nature and kind soever, which at the time of my decease, I, or any person or persons in trust for me, am or are possessed of, or entitled unto, and not hereinbefore disposed of, I give, devise, and bequeath unto the said and, their heirs, executors, administrators and assigns, according to the nature and quality thereof respectively, to and for their own separate use and benefit.

No. 61. Residuary Clause in Trust.

I give all the rest and residue of my personal estate, which shall remain after payment of my debts and funeral expenses, unto the said and, their executors, etc., upon and for the trusts, etc., herein-after mentioned (that is to say):

Upon trust that they, the said and

....., or the survivor, etc., do and shall, as soon after my decease as conveniently may be, with the consent and approbation of my said daughter during her life, and after her death, then of the proper authority of the said trustee or trustees for the time being, lay out and invest all the said rest and residue of my personal estate in the purchase of lands and tenements situate, lying and being in, and convey and settle the said lands and tenements, so to be purchased as aforesaid, or cause and procure the same to be conveyed and settled, to such uses, and for such estates, and with and subject to such powers and provisos, as are hereinbefore limited, created, and expressed, of and concerning the said messuages, etc., which are situate, lying, and being in the parish ofaforesaid (other than and except the estates for life hereinbefore given, or limited to my said wife and son successively, and the aforesaid term of ninety-nine years, and the trusts thereof), or as near thereto as the death of persons, and other circumstances. will then permit.

And, in the meantime, and until the said rest and residue of my personal estate shall be laid out and invested in such purchase or purchases as aforesaid, do, and shall from time to time, invest and lay out the same, or such part or parts thereof as he or they shall think fit, in the public stocks or funds, or on real securities at interest, etc.

And my will is, and I do hereby direct, that all the interest, dividends, and annual produce of the said rest and residue of my personal estate, and of the stocks, funds, and securities, wherein or upon which the same or any part thereof is or shall be invested or placed, shall belong and

be paid and payable to such person or persons as would, for the time being, be entitled to the rents and profits of the lands and tenements so to be purchased as aforesaid, in case the same were actually purchased and settled as hereinbefore is directed.

No. 62. Residuary Clause in Trust.

Item. All the rest, residue, and remainder of my estate, real, personal, and mixed, whatsoever and wheresoever, I order and direct to be converted into money as soon as the same can conveniently be done after my decease; and for that purpose, I do hereby authorize and empower my said executors, hereinafter named, and the survivor of them, to sell and dispose of all my said real estate, either by public or private sale or sales, for the best price or prices that can be gotten for the same, and by proper deed or deeds, conveyances, or assurances in the law, to be duly executed, acknowledged, and perfected, to grant, convey, and secure the same to the purchaser or purchasers thereof, in fee simple.

And, when the whole of my said residuary estate shall be converted into money as aforesaid, then I will and direct that the same shall be divided into four equal parts or shares, and disposed of as follows, to wit:

One full, equal fourth part or share thereof I give, devise, and bequeath unto my said executors, hereinafter named, and the survivor of them, in trust, that they or he do and shall put and place the same out at interest on good, real, security, or in the funded debts of the United States, the State of, or the city of, and pay over the interest or dividends thereof from time to time, when and as the same shall be got in and received,

unto my beloved wife,, during all the term of her natural life, which is to be in lieu of the dower to which she is entitled by law.

And from and immediately after the death of my said wife,, I give, devise, and bequeath the principal of the said one-fourth part or share of my said residuary estate to be equally divided, share and share alike, between my daughters,, and, and my son,, and any other child or children which I may have born by my present marriage; the part or share in this bequest of my said two daughters,, and, to be held, however, by my said executors, in trust, in the same manner and for the same uses as are hereinafter set forth and declared of and concerning the parts or shares of my said residuary estate bequeathed to them for the use of my said two daughters, and

One other of the said full, equal fourth parts or shares of the proceeds of my said residuary estate, I give, devise, and bequeath unto my said executors, hereinafter named, and the survivor of them, in trust, that they or he shall and do put and place the same out at interest in manner aforesaid, and pay over the interests and dividends aforesaid, from time to time, when and as the same shall be got in and received, unto my said daughter,, for and during all the term of her natural life; so, nevertheless, that the same shall be for her sole and separate use, notwithstanding any coverture, and not to be in anyway or manner whatever liable to the contracts, debts, or engagements of any husband which she may hereafter have or take, and not to be in any way or manner whatever subject

to the control or interference of such husband. And from and immediately after the decease of her, my said daughter,, then, as to the said principal, in trust to and for the only proper use and benefit of all and every the child and children which she, my said daughter,, then, as to the said principal, in trust to and for the only proper use and benefit of all and every the child and children of my said daughter,, may leave, and the lawful issue of any of them who may then be deceased, having left such issue, to be equally divided between them, share and share alike, such issue of any deceased child or children of my said daughter,, taking, however, only such part or share thereof as his, her, or their deceased parent or parents would have had and taken, had he, she, or they been living.

One other of the said full equal fourth parts, etc. (as in preceding clause, only substituting for).

And the remaining one full equal fourth part or share of the proceeds of my said residuary estate, I give, devise, and bequeath unto my said executors, hereinafter named, and the survivor of them, in trust, that they or he do and shall put and place the same out at interest in manner aforesaid, and pay and apply such interest, or so much thereof as shall be required, toward the education and maintenance of my said son,, until he attains the lawful age of twenty-one years; and when and as soon as he, my said son, arrives at the age aforesaid, then in trust to pay over the principal thereof, together with any accumulation of interest thereon which may be in their hands uninvested, unto him, my said son,

Item. In case of the decease of my said daughters, and, or either of them, without leaving lawful issue, or of the decease of my said son,, under age, and without leaving lawful issue, then, in such case, I give, devise, and bequeath the said part or share, hereinbefore given, devised, and bequeathed to such child so dying, unto my said executors, hereinafter named, and the survivor of them, in trust, to hold the same for my surviving child or children, in equal shares and proportions, in the same manner, for the same uses, intents and purposes, and under the trusts and limitations as are hereinbefore set forth and declared of and concerning the parts or shares of my said residuary estate hereinbefore given, devised, and bequeathed for the use, benefit, and behoof of my said children, respectively.

I. Contest Clause.

No. 63. Clause Prohibiting Contest.

In case any of the beneficiaries in this my last will and testament shall dispute or contest the legality or validity of the will, or the competency of the testator to make and execute this will, or shall in any manner interfere with the proof, establishment, and execution of this will, then and in such case, all provisions herein made for such beneficiary are hereby revoked and declared to be null and void, and of no force and effect whatsoever.

J. Power Clauses.

No. 64. Clause Granting Power to Trustees.

I hereby authorize and empower my said trustee to exercise discretionary powers of sale, lease, partition and exchange over the real estate, stocks, bonds, mortgages or

other securities or other personal estate or any part or parts thereof, at my decease or from time to time thereafter composing or belonging to the said residuary estate, or to the said trust properties, estates, and premises aforesaid and whether original or subsequent investments; and in case of any sale or sales to sell at public or private sale, for cash or on credit, together on or in parcels, and in case of any lease or leases to lease for such periods of time, not exceeding fifty (50) years for any one lease, and upon such terms and conditions as to my said trustees may seem best; including power to make building leases so called for such terms of time not exceeding fifty (50) years for any one lease and with such stipulations concerning appraisements of rent time to time and concerning the purchase of the lessee's buildings, and improvements, party wall agreements, and such other stipulations, as to my said trustees may seem best; and in case of any partition, whether by suit or deed, or in case of any exchange, to give or receive any sum or sums of money or other property for equality of partition or exchange.

I further authorize and empower my said trustees in their discretion to improve any portion or portions of the real estate at any time belonging entirely or in undivided interests of said residuary estate and said trust properties, estates and premises, by erecting, repairing, and maintaining thereon, either by themselves or in connection with other tenants in common, including my said trustees as individuals, such buildings and improvements as my said trustees may deem expedient.

And I further authorize and empower my said trustees in their discretion to plat any land belonging to the said

residuary estate and said trust properties, estates and premises into lots, also to lay out, widen, alter and improve such highways, streets or other ways, public or private, as they may think proper, and to waive compensation for land taken for such improvements as may be made by public authorities.

I hereby authorize and empower any trustee for the time being under these trusts, whether original or substituted, at any time or from time to time to delegate the powers and discretions or any of them vested in or exercisable by him under any of the trusts of this will to any other trustees or trustee for the time being, and the trustees or trustee for the time being under this will may at any time or from time to time appoint any agent or attorney to make, execute and deliver any deeds, transfers or any other instruments, or do any other ministerial act necessary or proper to be done in the execution of any of said trusts; also to represent and act and vote for them or him at any meeting of any corporation in which the said trust properties, estates and premises or any part thereof may be interested; with power to revoke any such delegations or appointment and the same from time to time to renew at pleasure.

No. 65. Clause Granting Power for Collection.

And my said trustees shall collect the income, dividends and profits accruing and arising from the said residuary estate, and said trust properties, estates and premises respectively, and the investments and reinvestments of the same, and shall pay therefrom all taxes, assessments, insurance premiums, repairs and all other expenses incurred in the care and management of said trust estate.

*K. Executor's Appointment Clauses.***No. 66. Clause for Appointment of Executor.**

I do nominate and appoint,
, to be the
 executors of this, my last will and testament.

No. 67. Clause for Appointment of Executor and Trustees.

I hereby nominate, constitute, and appoint my said trustees,, and, executors of this my last will and testament.

No. 68. Clause for Appointment of Executor.

And, I do hereby appoint and nominate my esteemed neighbors, and executors of this, my last will and testament, reposing full confidence in their integrity to perform the trust committed to them.

No. 69. Clause for Appointment of Executor With Powers.

I nominate and appoint as the executors of this will my said, and my said; and direct that letters testamentary issue to them without bonds. I give unto said executors full power to sell, mortgage, hypothecate, invest, re-invest, exchange, manage, control, and in any way use, and deal with, any and all property of my estate during its administration, without any application to court for leave, or confirmation, unless the same be expressly required by law, and without giving bond or any security whatsoever.

*L. Attorney's Appointment Clause.***No. 70. Clause for Appointment of Attorney.**

I recommend to my executors and trustees the employ-

ment of, of the firm of
 of, as their principal attorney
 and legal adviser, so long as said shall
 discharge his duties as such with skill and fidelity, and at a
 remuneration deemed by them just and reasonable.

M. Revocation Clause.

No. 71. Revocation Clause.

I hereby revoke and cancel all wills and codicils by me
 heretofore made.

N. Testimonial Clauses.

No. 72. Testimonial Clause.

In witness whereof, I have hereunto set my hand and
 seal this day of, in the
 year

. (Seal)

No. 73. Testimonial Clause.

In witness whereof, I,, the testator,
 have to this, my will, written on one sheet of paper, set my
 hand, this day of, in
 the year

. (Seal)

No. 74. Testimonial Clause.

In testimony whereof, I, the said,
 have to this, my last will and testament, contained on two
 sheets of paper (or otherwise, as the case may be), and to
 every sheet thereof, subscribed my name, and to this, the
 last sheet thereof, I have subscribed my name and affixed
 my seal, this day of,
 A. D.

. (Seal)

No. 75. Testimonial Clause.

In witness whereof, I, of
, on this of
 have declared this to be my last will and testament, and
 have hereto set my hand in the presence of witnesses below
 subscribing, and who have witnessed the same in my pres-
 ence.

O. Attestation Clauses.

No. 76. Attestation Clause.

Signed, sealed, published, and declared by,
 the testatrix above named, as and for her last will and tes-
 tament in the presence of us, who, in her presence, at her
 request, and in the presence of each other, have hereunto
 set our names as witnesses.

.....

No. 77. Attestation Clause.

We, the undersigned, certify that
 on this day of,
 A. D. 19.....,, exhibited to us the fore-
 going instruments in typewriting on
 pages, inclusive of this, and declared the same to be his
 last will and testament, and requested us to witness his
 execution of the same. Whereupon he did, in our pres-
 ence, and in the presence of each other, subscribe his name
 at the end thereof, and the signature
 at the end thereof is the genuine signature of the testator.
 He did also in our presence write the initials on
 the margin of the, and
 pages of said instrument. We do, therefore, in the pres-
 ence of said testator and in the presence of each other,
 subscribed our name hereto as attesting witnesses.

SELECTED MICHIGAN WILLS OF LARGE ESTATES.

- No. 78. Will of Mr. George V. N. Lothrop.
- No. 79. Will of Mr. Maxwell M. Fisher.
- No. 80. Will of Mr. Russell A. Alger.
- No. 81. Will of Mr. Charles H. Hackley.
- No. 82. Will of Mr. Simon J. Murphy.

There is a large number of finely drafted wills in this state. In the selection given a few of the more suggestive ones are included. None of these have been construed, as they were not contested. Unusual talent was employed in their drafting.

No. 73. Will of Mr. George V. N. Lothrop, Containing: Bequests, Creation of Estates, Advancements, Trusts, Codicils, etc.

The overwhelming affliction with which our Heavenly Father in His all wise Providence has permitted my family and my self to be visited in the recent deaths of my dear and affectionate son,, and of my most dearly beloved and saintly wife, has seemed to make necessary some material change in my testamentary dispositions: therefore in gratitude to Almighty God for the many and great blessings for many years bestowed on me and my family, and in humble submission to his Divine Will, I make and constitute these Presents as my last Will and Testament.

1. I hereby revoke and annul all wills and codicils by me heretofore made.

2. Out of my personal Estate my Executor shall pay the expenses of my funeral, all debts I may be owing at my death, all taxes and assessments alike on my real and personal Estate, then due.

3. I desire to be buried in my lot in Elmwood Ceme-

tery beside my most dear wife, and I give and devise said lot to my dear son and my dear daughter, their heirs and assigns forever.

4. Should my homestead at Street where I have so long lived, still be used as my residence in the City of at the time of my death, and if my beloved daughter,, should wish to still occupy the same as her residence, I direct that she shall have the right so to do, so long as she shall wish to do so, without any charge for use or rent whatever during the first year and thereafter without any charge except for taxes and assessments thereon.

5. My Law Library and Law Office furniture and fixtures I give in equal shares to my dear sons and

6. To my most dearly beloved daughter,, I give and bequeath all my household furniture and domestic utensils wherever the same may be; all the books and maps of my private Library, all my pictures, plate, tableware, all wearing apparel, linen, beds and bedding, rugs, and carpeting, and all clocks and watches, except such as may hereinafter be otherwise specifically disposed of; also all my horses, carriages, sleighs, harnesses, carriage-robes and blankets, Provided that the above shall not be construed to include farm tools, wagon or farm horse or cows.

7. I have three good gold watches all of which I give to my dear daughter with the request that she shall give my non-magnetic watch to my dear namesake, when she thinks he will take good care of the same; that one of the other of said watches

she shall on like terms give to my dear grandson,
..... and that she shall dispose of the third according
to her best judgment.

8. I confirm to my dear sons and daughters severally
all gifts of money and property, which I may have made to
them or any of them in my life time. They shall not be
required to account for any such gifts unless I hold at my
death some notes, or obligation in writing of the child to
whom said gift has been made: Provided, however, that
gifts of money or property which I shall have heretofore,
or may hereafter, make to any of my dear children, by
way of *Advancement*, shall be taken into account in the
final division of the residuum of my Estate, as hereinafter
provided.

9. To my dear son,, who has for a
good many years most faithfully taken care of my business
affairs, I give the sum of dollars.

10. To each of my beloved and affectionate daughters-
in-law viz.,, and
....., as a token of my love, I give the sum of
..... Dollars.

11. My dear son,, at his untimely
death, left surviving his widow, and four
minor children, all of tender years, to wit,,
....., and, the oldest of said
children being under years of age, and the young-
est being under years of age. In view of the
tender age of said children, it seems to me probable that
the most useful form of my testamentary bounty in their
behalf, will be to place the same *in trust* for a limited period
as hereinafter provided.

I therefore hereby give, devise and bequeath to my son
....., of the City of, his heirs,
assigns and successors in trust, the Lands and Tenements,
and the personal property hereinafter more fully described:
To Have and to Hold all and singular the Lands and Tene-
ments to and the personal property *in Trust* for the use and
benefit of the aforesaid minor children, to wit,
.....,,, and
..... or the survivor or survivors of them, during the
period of the lives of the oldest two of said minor chil-
dren, living at my death, or the life of the survivor of
said two last mentioned minor children, or for such other
and shorter period as may be hereinafter designated for the
termination of said trust. The Lands and Tenements above
devised upon said Trust are more particularly described as
follows, to wit, Lots,,,
.....,,,,,
and and also so much of the Private Way as lies
between said Lots and according to
..... plan of subdivision of that part of Private Claim
No. lying between Avenue, the,
..... Street and Avenue and all in the City
of County,, which plan
is recorded in Liber, page of Plats in the
Office of the Register of Deeds, County,
..... Also that certain Lot or parcel of land situ-
ate on the side of Avenue aforesaid
in said city of and more fully described as
Lot Number (.) in the Subdivision of Walker
Tract, and being a part of the Farm so called
and being in the Ward of said City of
and State of

The personal property bequeathed in *Trust* as aforesaid is dollars in value, of Notes, Bonds, Contracts, Mortgages, Stocks, or other good personal securities, to be selected from my personal Estate, at a fair cash valuation, by my Executor, and by him assigned, set over and delivered to, Trustee as aforesaid. Said Trustee his heirs, assigns, and successors in trust shall have full power to sell any and all property and it shall be his duty to do so whenever the interest of said trust requires. He shall sell all said lots or parcels of land as soon as he can do so without sacrifice. The proceeds of all such sales, and of all surplus funds of said trust, he shall invest in good interest bearing securities, always preferring those of undoubted security to those of higher rates of interest. Said Trustee shall from time to time apply the net revenue, or income, of said trust property to the proper support, maintenance, education and training of said minor children, or the survivors of them, always aiming at an equal distribution of said income, according to his best judgment, but with full power to part from this rule, whenever sickness or any other special exigency shall require an unequal application of said income among said children. He may use such a discretion in this request as a loving Father would with his children. Should any one or more of said children die during the life of said trust, the same shall not thereby cease, but the equitable interest of the deceased shall pass to the survivors, and the trust shall thereafter be administered for the survivor, the trustee, however, having full power to pay out of the interest of the deceased any reasonable and just debts of the deceased. On the day of, A. D., the oldest of said minor children, if he shall so long live,

will attain the age of years, and the other of said minor children will then have attained ages when, so far as I can now foresee, it will not be advisable longer to continue said Trust. And if said Trust has not already been terminated by the expiration of the two lives on which said Trust was originally limited, I direct that said Trust shall then, to wit, on the day of A. D. finally cease. Whenever said trust shall cease whether by the expiration of said two lives, or by the limitation of time last above fixed, the said minor children, or such of them as are then surviving, shall be entitled to have received and possess, wholly discharged of said trust all of said trust property in equal shares, and said Trustee, his heirs, assigns and successors in trust shall convey, transfer and deliver all of said trust property to those then entitled to the same.

11. Should the Trust herein provided for, fail to have effect or be set aside for any defect or legal cause, then, on the happening of any such event, I give, devise and bequeath the entire Lands, tenements and personal property described in Article of these Presents to the said four minor children to wit,, and, or those of them surviving at my death, share and share alike to have and hold the same absolutely and without condition, it being my wish that my intended bounty to said children shall in no event fail.

12. Should any of the Lands and Tenements above devised in trust, be alienated or sold, on contract by me in my life time, I direct my Executor to replace the same, out of my Estate, with other property of equal value, and to con-

vey the property so substituted to
Trustee to be by him held on the trust above set forth.

13. In case any contract for the sale of Land made by me in my life time, shall have been so performed by the purchaser or his heirs or assigns before the final settlement of my Estate, as to entitle him or them to a conveyance of said Land, I authorize my Executor, his heirs, assigns, or successors to make and deliver such conveyance as is required by such contract.

14. There are now in my employment several persons, who have been with me for a considerable time, and for whose faithful and affectionate service to my beloved wife, as well as myself, I have a most grateful sense. I therefore give and bequeath to, dollars, to, dollars, to dollars, to dollars, to dollars and to (recently come into my family) I give dollars, if she shall remain in my service till my death or for a period of months.

15. Subject to the gifts and devises and provisions above set forth, I give, bequeath and devise all the rest and residue of my Estate, real and personal of every nature, and wherever situate, in equal shares to my five children now living, to wit,, my three living sons, and the, wife of,, and being my two daughters, and to their several heirs and assigns, subject however to the provisions following: Where a certain of the gifts of money and other property heretofore made by me to my children have been intended

by me as *advancements* out of my estate, on account of the several shares which might come to them at my death in the division of the residuum of my estate, I therefore direct that in the making up of said residuum all such Advancements, whether heretofore, or hereafter made, shall be added to such residuum and make a part thereof, at their face amount, and without interest. The residuum so ascertained shall be the residuum intended, and in the actual division thereof the amount of Advancement made to each of said children shall be set over to the child who has received the same, and be taken and accounted as a part of his or her equal share of said residuum. Nothing shall be counted as an *Advancement* within the meaning of this Article unless mentioned as such in some entry in some of my account books, in my handwriting, or in some other writings made by me.

16. Should any of my children named in the preceding Article die in my life time the share of such child shall lapse and become a part of the residuum of my Estate. Provided, however, that if said child shall leave any lawful issue living at my death, such issue takes the share of my Estate that his, her or their parent would have taken under this will if then living.

17. I appoint my dear son the Executor of this my Will and Testament, and it is my wish that the Official Bond required of him by the Probate Court shall not exceed dollars.

In witness whereof, I,, of,
....., on this of, have
declared this to be my last will and testament, and have
hereto set my hand in the presence of the witnesses below

subscribing, and who have witnessed the same at my request in my presence.

.....

CODICIL.

On full reflection, I deem it important to make some changes in my last will, dated:....., and especially in that part which relates to the trust which I wish to create for the use of the four children, now at the date hereof surviving, of my dear deceased son, I therefore make and publish this codicil to my said last will.

I give, devise and bequeath to the COMPANY, of, its successors and assigns, the land and tenements, and the personal property below described, in trust, however, for the use and benefit of said four children to wit:,, and, during the period of said trust, as hereinafter more especially limited.

The property above given, devised and bequeathed is more particularly described as follows:

FIRST:—The lands and tenements, to wit: Lots and, and also so much of the private way as lies between said lots and, according to Plan of Subdivision of that part of Private Claim lying between in said City of, and more fully described as lot No. in the Subdivision of the Walker Tract, and being a part of the Farm so called, and being in the ward of said city of and State of

SECOND:—The personal property above given, devised and bequeathed is described as follows:—

- (1) Fifty shares of the First National Bank.
- (2) Fifty shares of the Detroit National Bank.
- (3) shares of the First National Bank, Prescott, Arizona.
- (4) shares of \$...... each, of the corporation, of
- (5) shares of stock of the New York Central & Hudson River Railroad Company, of New York.
- (6) shares of the Michigan Central Railroad Company of Michigan.
- (7) A certain promissory note, made by at Bay City, in the principal sum of dollars, bearing date,
- (8) A note made by of in the principal sum of \$......, bearing date,
- (9) A note made by, of, in the principal sum of \$......, bearing date, endorsed by
- (10) A note made by in the principal sum of \$......, bearing date, endorsed by of,
- (11) A bond, and the mortgage collateral thereto, to secure the principal sum of \$......, made by, of, bearing date,
- (12) A certain land contract bearing date,

....., payable ten years from the date thereof, made originally with of, and embracing certain premises which are part of private claim, and fronting on the eastern on the side thereof, and extending along said in front feet, and lying between said and Avenue. Said contract is now held by of, and the principal sum of \$. is now unpaid thereon. Said premises are more fully described in said contract; and I devise the same in fee to said TRUST Company, in trust, to enable it to make due conveyance of said premises when said contract shall be fully performed by said his heirs or assigns.

The said trustee, its successors and assigns, to have and to hold each and every parcel of said property, whether of real or personal estate, but nevertheless in trust, for the said four minor children above named, during the period of the lives of the eldest two of said minor children living at my death, or for the life of the survivor of said children last above mentioned, or for such other and shorter period of time as may hereinafter be designated for the termination of said trust.

Said trustee shall take possession of all said property, pay taxes and assessments thereon, and collect all rents, interest, or other income due upon the same.

Said trustee, its successors and assigns, shall have full power to sell and convey all of said property, and to con-

vert the same into money, whenever the interest of said trust requires, and it shall sell all said lots or parcels of land, as soon as the same can be done without sacrifice. The next proceeds of all such sales and of all surplus funds of said trust shall be, from time to time, invested in good interest bearing securities, always preferring those of undoubted security to those of higher rates of interest. The net revenue of the income of said trust property shall be applied by said trustee to the proper support, maintenance, education and nurture of said four minor children, or the survivors of them, always aiming at the equal distribution of said income, according to its best judgment, but with full power to depart from this rule. Whenever sickness or other special exigency shall require the unequal application of said income among said children, it may use such discretion in such matter as a loving father would with his own children. Should any one or more of said minor children die during the life of said trust, the same shall not hereby cease, but the equitable interest of the deceased shall pass to the survivors, subject to the said trust, which shall thereafter be administered for the use of the survivors.

On the day of, A. D., the said, the eldest of said minor children if he should so long live, will attain the age of years, and the others of said minor children will then have attained ages when, so far as I can now foresee, it will not be advisable longer to continue said trust.

If said trust has not then already been terminated by the expiration of the two lives on which said trust was originally limited, I direct that said trust shall then, to wit on the day of, A. D., finally

cease. Whenever said trust shall cease, whether by the expiration of said two lives, or by the limitation of time above fixed, said minor children, or such of them as are then surviving, shall be entitled to have, receive and possess, wholly discharged of said trust, except the lawful charges thereof, all of said property, in equal shares, and said trustee, its successors and assigns, in trust, shall then convey, transfer and deliver all of said trust property to the children then entitled to the same. Should any of the lands and tenements above devised in trust be alienated or sold by me in my lifetime, or any one of the personal estate securities above mentioned be paid in full or in part, I direct my executors to replace the same out of my estate, with other property of equal value, and to convey the property so substituted to said trustee, its successors or assigns.

In Article of my said will of, the legacy given to should be changed from dollars (....) to (\$....).

No charge whatever is to be made against the estate of my deceased son The principal changes intended to be made in my will of, by this codicil, relate to the provisions of Article, of my said will, and except as changed or modified by this codicil said will is hereby confirmed.

In Witness Whereof, I, of,, on this day of A. D., have made and published this instrument as a codicil to my last will and testament, and have hereto set my hand in the presence of the witnesses below subscribing, who at my request, and in my presence, have attested the same.

.....

SECOND CODICIL.

The death of my dear son,, which took place on the day of, leaving him surviving a widow,, and two minor children, one named, aged about years, and the other named, aged about, has made necessary some changes in my previous will.

1. It was my wish, as set forth in Article XV of my will bearing date, that at my death my said son, should take an undivided of the residue or residuum of my estate, which purpose being defeated by the untimely death of my said son I now wish that of the residue or residuum of my estate at my death the undivided shall go for the use and benefit of said two minor children in the manner hereinafter provided.

2. To that end I give, devise and bequeath to aforesaid, of, as trustee for said two minor children, namely and, the undivided of the residue or residuum of my estate, being a like interest to that intended by the fifteenth Article of my said will dated, to go to my said son The said to have and to hold said of said residue or residuum of my estate in trust for the use and benefit of said and, or the survivor of them, for the period during the continuance of the two lives of said and of Mrs., both of

3. Said trustee shall take possession of said trust prop-

erty as soon after my death as the condition of my estate will fairly warrant, shall pay the lawful taxes and assessments thereon, shall manage, invest and reinvest the said trust property; shall sell and convert the unproductive portions thereof into productive property; shall collect all rents, interest and income, and shall use the same, so far as necessary, and from time to time, for the education, care, nurture and support of said and said
.....

4. If either said or said shall die during the continuance of said trust, leaving the other of said two children surviving, the share of the deceased in the said trust property shall pass to the survivor thereof, subject to said trust. Should both of said minor children die during the continuance of this trust, leaving no lawful child or children them surviving, all of the trust property remaining in the hands of said trustee shall at once revert and pass to this testator, his heirs and assigns.

5. If during the continuance of said trust said shall attain the age of years, and can in the judgment of said trustee be safely entrusted with the independent ownership, use and control of the property hereby put in trust for her, then said trustee shall divide said trust property into two equal parts, one of which parts she shall at once assign, pay and deliver over to said , who shall take the same free of said trust and for her own absolute use and control, said trustee thereafter retaining the other part of said trust property for the use and benefit of said

6. In like manner if during the continuance of said trust the said shall attain the age of

..... years, and can then, in the judgment of said trustee, be safely entrusted with the share of property put in trust for her hereby, then said trustee shall at once assign, pay and deliver over the same unto said for her separate use and control. But if said or said, on attaining the age of years, are not entitled to receive their respective share of said trust property, then the portion of the same retained by said trustee shall continue to be held under the trust aforesaid until the final expiration of said trust, at which time said trustee shall pay their respective shares over to said and

7. For the purposes of this second codicil the residue or residuum of my estate is to be ascertained in the same manner as if my said son were still living, and the advancements made by me to him during his lifetime are to be taken into account in ascertaining the value of the share hereby given for the use and benefit of said minor children and

8. I give and bequeath to my son all my law library, and my interest in the law library of the old firm of &, including the library fixtures, and Article V of my said will of, is hereby modified accordingly.

9. The legacy given to in the first codicil to my will is hereby revoked, she having left my employment.

10. I hereby appoint my son, executor of this the second codicil to my will; confirming him also as executor of my will bearing date,, and also of the first codicil to said will.

In witness whereof, (same as before).

THIRD CODICIL.

As it is possible that my two daughters, and may, pending the settlement of my estate, need some pecuniary assistance, I therefore direct my executor to pay to each of my said beloved daughters, and at the rate of dollars (\$) annually until the division of the residuum of my estate shall be made as provided in my aforesaid will; said payments to each of my said daughters to be paid in equal sums monthly, as near as may be convenient to my executor. Said payments shall begin on the probate of my said will, and the money so paid shall be considered as advancements out of their shares of my estate, and shall be so treated when the division of my estate shall be made. The same shall not draw any interest.

In witness whereof, I (same as before).

No. 79. Will of Mr. Maxwell M. Fisher, Containing: General Bequests, Trusts, Provision Against Contest, Etc.

I,, of the City of, County of and State of, being of sound mind and memory, do hereby make, publish and declare this my Last Will and Testament, hereby revoking all former wills by me made.

Section One. I give and bequeath to my wife, , as follows:

1st: For and during the term of her natural life, the use of my homestead situated on the side of Avenue,, and described as follows, to wit: the () feet of lot () and the and ()

feet of lot () in Block () of the Brush Subdivision,, together with the buildings thereon.

2nd: All of my household furniture, silver, paintings, books and bric-a-brac, also all my horses, carriages and harnesses at my homestead, intending hereby to include all the personal property owned by me at my homestead in not hereinafter disposed of.

Section Two. To my grandson, I give and bequeath my diamond shirt-stud.

Section Three. To my grandson, I give and bequeath my watch chain.

Section Four. All the rest and residue of my estate, both real and personal, of whatsoever kind and nature and wherever situated, I give, devise and bequeath to the Trust Company, a corporation, of, or the successors of it, in trust for the purposes following:

1st. It shall pay all taxes, assessments, levies, insurance and repairs on all of my estate hereby devised and bequeathed in trust, including my homestead, the life estate in which I have herein bequeathed to my wife,

2nd. As long as my trustee or its successor shall not dispose of my Oakland County Farm, I direct,

(a) That during the period of the trust herein created, my son and, his wife, and the survivor of them, shall have the use of the frame house now occupied by them, the garden spot east of said house, and the east end of the large barn on said farm.

(b) I further direct that the income of my "Oakland County Farm" be first charged with all taxes, assessments, levies, insurance and repairs on said farm, including prem-

ises thereon, the use of which I have herein given my son and, his wife, and that the residue therefrom be given to my son Should the income of said farm be insufficient to pay the above charges, I direct my trustee to pay the deficit out of the general income of my trust estate.

3rd. In the event of the sale by my trustee of said Oakland County Farm, I direct that (\$) of the proceeds of said farm, shall be invested by said trustee in a home for the use of my son, and, his wife, and the survivor of them for and during the period of this trust.

I also direct my trustee shall pay all taxes, assessments, levies and repairs on said home, and should said home be destroyed by fire or otherwise, my trustees shall rebuild the same.

4th. In the event of the destruction at any time of the buildings on said lot () and the north and () feet, of lot (), Block () of the Brush Subdivision, during the life of my said wife,, my trustee shall rebuild the same, it being my desire that my said wife shall always have a suitable home.

5th. I further direct that my trustee shall keep my vault in Elmwood Cemetery in good repair, and it is my wish and desire that my wife and my grandson shall be buried in said vault.

6th. From the net income of my estate hereby devised and bequeathed to it in trust (except the net proceeds of my "Oakland County Farm" as herein provided for my son) I direct that my trustee shall pay in quarterly installments as follows:

(a) To my wife,, for and during the term of her natural life, the sum of (\$) per annum.

(b) To my son for and during the term of his natural life, the sum of dollars (\$) per annum.

In the event of the sale of my Oakland County Farm by my Trustee, I direct that the above annuity to my son be increased to dollars (\$) per annum.

(c) To my grandson,, the sum of dollars (\$) per annum for and during the period of the trust herein created.

(d) To my granddaughter,, the sum of dollars (\$) per annum for and during the period of the trust herein created.

(e) To my grandson,, the sum of dollars (\$) per annum for and during the period of the trust herein created.

(f) To my granddaughter,, the sum of dollars (\$) per annum for and during the period of the trust herein created.

(g) To my granddaughter,), the sum of dollars (\$) per annum for and during the period of the trust herein created.

(i) To my granddaughter,, the sum of dollars (\$) per annum for and during the period of the trust herein created.

(j) To my granddaughter,, after she attains the age of years, the sum of dollars (\$) per annum for and during the remainder of the period of the trust herein created.

(k) To my grandson,, after he attains the age of years, the sum of dollars (\$) per annum for and during the remainder of the period of the trust herein created.

(l) To my grandson,, after he attains the age of years, the sum of hundred dollars (\$) per annum for and during the remainder of the period of the trust herein created.

Section Five. In the event of the death of any of my grandchildren herein provided for, during the period of the trust herein created, I direct that if said grandchildren leave issue, the annuity of said deceased grandchild as herein provided, shall be paid by my trustee to the issue of said deceased grandchild during the period of the trust herein created.

Section Six. Should the net income of the property herein bequeathed and devised in trust be insufficient to pay the annuities herein provided, I direct that said annuities shall be reduced proportionately by whatever percentage is necessary to bring them within the income of my estate.

Should the net income of my estate herein devised and bequeathed exceed the amount necessary to pay the annuities herein provided, I direct that said annuities be increased proportionately by whatever percentage the surplus income of my estate shall warrant.

Section Seven. I do hereby fully authorize and empower the trustee above named, or its successors in said trust in its discretion, to sell, mortgage, lease and release any and all of my estate hereby devised and bequeathed in trust, and to execute good and valid instruments therefor, to keep the buildings in good repair, to rebuild when necessary, and

erect suitable buildings on my lands, and to have the entire control and management of the property hereby devised and bequeathed in trust.

Section Eight. I direct that my estate herein devised and bequeathed in trust, shall be kept intact and held in trust by my said trustee, or its successors, until the death of my wife and my son Upon the death of the survivor of my said wife and my said son, I direct that the whole of the said trust estate be forthwith distributed among my heirs at law in the same manner as though I had died intestate at the time of the death of the said survivor.

Section Nine. The provisions for my wife in this my Last Will and Testament, I declare to be in lieu of dower and of her legal share in my estate.

Section Ten. I hereby nominate and appoint my wife,, of, and my grandson, of, executors of this my Last Will and Testament, and direct that they be required to give no bond for the faithful discharge of their duties.

Section Eleven. In case any of the beneficiaries in this my Last Will and Testament, shall dispute or contest the legality or validity of the Will, or the competency of the Testator to make and execute this will, or shall in any manner interfere with the proof, establishment, and execution of this Will, then and in such case, all provisions herein made for such beneficiary are hereby revoked and declared to be null and void, and of no force and effect whatever.

In Witness Whereof, I have hereunto set my hand and

seal this day of in the year
and

..... (L. S.)

The foregoing instrument was on the date thereof signed, sealed, published and declared by the said testator as and for his Last Will and Testament, in the presence of us, who at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereof.

.....

.....,

.....

.....,

No. 80. Will of Mr. Russell A. Alger, Containing General and Charitable Bequests, Provisions in Lieu of Dower, Power of Sale, Codicil, Etc.

I,, of the City of, in the County of and State of, being in good bodily health and of sound mind and memory, do make, declare and publish this as and for my last Will and Testament, hereby revoking all other wills heretofore made by me.

First, I direct that my Executors, hereinafter named, shall pay all my funeral expenses and all just debts, which I may owe at the time of my death, and for this purpose I authorize them to sell or mortgage either real or personal property, of which I may die seized or possessed.

Second, I give, devise, and bequeath to my beloved wife my homestead, being lots numbered and in Block, farm, situated on the corner of and Streets,, also all my household goods, fixtures

and effects of every description, including furniture, paintings and statuary, my library and all other household furnishings, both of use and ornament, and my carriage horses and such of my carriages, sleighs and harnesses, robes and appurtenances and outfit connected with my carriages, as she may elect.

Third, I give, devise and bequeath to my said wife,, my watch and chain and all my military accoutrements and equipage and all my war relics, with the request that she distribute them as she may think best among our children.

Fourth, I also give, devise and bequeath to my wife,, absolutely, the undivided one-third part of all other property, real and personal, of which I may die seized or possessed, in lieu of dower.

Fifth, I direct that any indebtedness found to be due to me at the time of my death, from my brother of,, either in the form of notes which he has given me, or any amounts which may be charged against him on open account on my books, be canceled and that all claims for same be waived by my Executors.

Sixth, For my friendship, for my entire confidence in and for the services he may render as Executor, as herein named, I will and bequeath to the sum of dollars (\$).

Seventh, I hereby give, devise and bequeath as follows: To the Home of the Friendless of, the sum of dollars (\$). To the Woman's Hospital and Infants' Home of, the sum of dollars (\$). To the Thompson Home for Old Ladies

of, the sum of dollars (\$).

Eighth, All of my Estate not herein otherwise disposed of I give, devise and bequeath, share and share alike, to my daughters,, and
., and my sons and, or such of them or their children as shall survive me. Provided, however, that the share of my daughter
. shall not go to her directly until she shall attain the age of years, but to the Trust Company of,, with full power to sell and dispose of the same or any part or parts thereof, and to invest and re-invest the proceeds as in the judgment of said Trust Company of may seem best upon trust nevertheless, to the ends, intents and purposes following, to wit:

a To pay the cost and expense of said trust.

b. To pay the net annual income thereof to my said daughter,, until she shall attain the age of years, when she shall receive the whole principal or body of her share. If, however, my said daughter,, shall die before she shall have attained the age of years the principal or body of her share shall be immediately disposed of in accordance with the terms of such last will and testament as she shall have made.

Ninth, I hereby direct that in any of the sales or distribution of my property that may be made, as provided for in any of the foregoing sections of this my last Will and Testament, the Capital Stock held by me in the Corporation of be excepted and that the said stock be not sold or distributed, except not above ten per cent per annum of its earnings, if it shall earn that amount, but

that it be held by my Executors hereinafter named until the incorporation period of said Company shall expire by limitation, when it shall be distributed in the same proportion as the balance of my estate, unless in the judgment of all my Executors the interest of my estate demands that the said stock be sold or distributed among my legatees, in which case said Executors are hereby authorized and empowered to make such disposition of said stock as may in their judgment seem best.

Tenth, My Executors shall have power to sell and convey real estate at their discretion, if in their judgment the interests of my estate demand.

Eleventh, I hereby nominate and appoint my wife,
, my sons and
 of, my daughters
 of, of
 and of of
, and of
, Executors of this my last Will and Testament with the powers herein conferred and I request that the statutory requirement in such cases, in relation to the giving of bonds be waived.

In Witness whereof I have hereunto set my hand and seal this day of, A. D.
L. S.

The foregoing instrument consisting of six pages written on legal cap paper (including this page) was on the date thereof signed, sealed and published and declared by the said, the Testator therein named, to be his last Will and Testament and he, at the same time acknowledged to us and to each of us that he had signed

and sealed the same and therefore, we, at his request and in his presence and in the presence of each other, signed our names as attesting witnesses.

.....,

.....,

CODICIL.

I,, do hereby declare this to be a Codicil to my last Will dated,

I give, devise and bequeath to my brother, of,, the sum of dollars.

I hereby ratify the foregoing Will in all other respects.

Witness my hand and seal this day of

No. 81. Will of Mr. Charles H. Hackley, Containing: Bequests of All Kinds, Estates, Trusts, Charitable Trusts, Provisions to Continue Business, Provision in Lieu of Dower, Provision in the Event Legacies Lapse, Provision for Appointment of Trustees, Power of Sale, Etc.

I,, of the City of, in the County of, and state of Michigan, do hereby make and publish my last will and testament, intending thereby to dispose of all my worldly estate of which I shall be possessed at the time of my decease.

1. I direct that all my just debts, including funeral expenses and the expense of the administration of my estate, be paid by my executors.

2. I give and bequeath unto my beloved wife,, all my household goods, pictures, plate and family horses, carriages, sleighs and property pertaining thereto, absolutely and forever.

3. I give, devise and bequeath to my wife,

....., and to her heirs and assigns forever, absolutely, the following property situate in the city of, county of, and state of Michigan, known and described as and being the same property which now constitutes my homestead.

4. Should my co-partners,, of the firm of, survive me, I will and direct that said co-partnership shall not be dissolved by my death, without the consent of said, and if said so elects, said partnership shall be continued and its business may be carried on by him in said firm name without let or hindrance from my heirs or representatives for a period of not exceeding ten (10) years from my death (unless in the meanwhile said should also die) in order that the affairs and business of said co-partnership of may be gradually wound up and settled and its property disposed of so far as possible during said period of ten (10) years, without loss or embarrassment to my said surviving partner or my estate. And my capital shall remain and be used in said business, and shall not, nor shall any part thereof, be withdrawn while said business is being continued by my said surviving partner during said ten (10) years, without the consent of my surviving partner, except as is provided in the articles of co-partnership, dated May 29, 1896, executed by said and myself. And I hereby direct and require my said executors and trustees to be controlled and governed in respect to my interest in said co-partnership of by the articles of co-partnership last mentioned, and also by all such amendments to said co-partnership ar-

ticles as shall hereafter be executed by said
and myself.

And I also require and direct my said executors to make, execute, acknowledge and deliver all deeds, contracts or other instrument of, or concerning my interest in the lands or other property of said co-partnership of, that my said surviving partner,, shall deem needful for carrying on or winding up the business of said co-partnership.

5. I direct my executors from and after my decease, to pay to my beloved wife,, for her support, the sum of per year, or so much thereof as may be required, (in addition to the sum to be paid to her from the net income, rents and profits of the trust estate created in the thirty-fourth (34) clause of this will), to make up said sum of per year; such payment of the whole or a portion of said sum of to be continued until the net income, rents and profits of the said trust estate shall be equal to the sum of per year, and shall be paid quarter-yearly, in advance, unless in the meanwhile my said wife shall die, in which case said payments shall cease.

6. I give and bequeath to my adopted son, of, the sum of dollars.

7. I give and bequeath to of, daughter of my niece, the sum of dollars.

8. I give and bequeath to my niece,, the sum of dollars.

9. I give and bequeath to my cousin,

of, the sum of dollars.

10. I give and bequeath to my friend,
of, the sum of dollars.

11. I will and direct my executors to pay to my aunt,
....., of, the sum of
..... dollars per annum for and during her
natural life, to be paid in monthly installments.

12. I give, devise and bequeath to my aunt,
..... of the following
real estate, in fee simple, with buildings thereon situate,
being in the city of, county of,
and state of, and described as follows, to-
wit: I
also give and bequeath to said the sum
of dollars; and I give and bequeath to
each of her children the sum of

13. As a testimonial to the faithful service which.....
..... has rendered to my family for a number
of years, and to show my appreciation of the same, I give
and bequeath to her the sum of

14. I give and bequeath to my coachman,
....., the sum of dollars.

15. I give and bequeath to of
....., the sum of dollars.

16. I give and bequeath to of
....., the sum of dollars.

17. I give and bequeath to of
....., the sum of dollars.

18. I give and bequeath to of
....., the sum of dollars.
And if said shall, within

years after my decease, change his name to ,
I then give and bequeath to him an additional sum of
..... dollars.

19. I give and bequeath to , son
of , of , , the
the sum of dollars.

20. I give and bequeath to ,
daughter of , of , ,
the sum of dollars.

21. I give and bequeath to ,
and , children of ,
and , the sum of
dollars apiece.

22. I give and bequeath to , daughter
of , of , ,
the sum of dollars.

23. I give and bequeath to my cousin,
of , , the sum of dollars.

24. I give and bequeath to , of
..... , , the sum of dollars.

25. I give and bequeath to the
Humane Union of said city of , the sum of
..... dollars.

26. I give and bequeath to the Congregational Church
in said city of , of which my wife is a mem-
ber, the sum of dollars.

27. I give, devise and bequeath to The
Trust Company, a corporation of the city of
the sum of dollars, in trust, to hold
and invest the same forever, and I direct that said The
..... Trust Company, as trustee as aforesaid, and

its successors, shall pay the net income thereof, in each year perpetually to the Public Schools of the city of a body corporate, and that the said net income, or so much thereof as may be necessary, shall be used and expended forever by the Board of Education of said Public Schools in providing suitable instruction, free of charge, for such of the boys and girls of the city of as may desire to have the benefits of a Manual Training School, and the residue of said income, if any, to be used by the Board of Education as it may be needed for maintaining, enlarging and equipping the buildings of said Manual Training School. Such School to continue to be the property of the Public Schools of the City of, and to be under the control and management of said Board of Education, and the course of instruction and training therein to be substantially such as are usually prescribed by Manual Training Schools of the best class in the country; and after providing adequate accommodation for resident pupils, the Board of Education may admit to said school non-resident pupils, upon such terms and conditions as it may prescribe. I have already given to said Public Schools the sum of dollars as an endowment fund, with the understanding and agreement between said Board of Education and myself, that the net income of said sum shall be used for the same purposes for which I have directed the net income of said bequest of dollars, to be used; and it is my intention, by the bequest of dollars contained in this clause of my will, together with the sum of which I have already given to said Public Schools as aforesaid, to create and give to said Public Schools an endow-

ment fund of dollars in all, for the purposes mentioned in this clause of my will. And I direct that whatever sums shall hereafter be paid by me during my life-time, either to said Public Schools directly or to said The Trust Company as trustee or otherwise, for the purposes mentioned in this clause of my will, shall be credited on the aforesaid bequest of dollars and deducted therefrom.

28. I give and bequeath to the Hospital, a corporation of said city of, the sum of dollars for the purpose of erecting a hospital building in said City of and equipping the same. And I give and bequeath to said Hospital the further sum of dollars as an endowment fund to be invested and re-invested from time to time by said Hospital, and the net income thereof to be used and expended according to its discretion in carrying on the work for which it has been organized. If the erection of said hospital building and the equipment of the same shall cost less than the sum of dollars which I have given as above for that purpose, I will and direct that whatever of said sum of Dollars may remain shall be added to and become a part of said endowment fund above mentioned. And I direct that whatever sums have been or shall be paid by me during my life-time to said Hospital for the several purposes mentioned in this clause of my will, shall be credited on the respective bequests contained in this clause of my will and be deducted therefrom.

29. I give, devise and bequeath to said The Trust Company, the sum of dollars in trust, to

hold and invest the same forever, and I direct that the said The Trust Company, as Trustee as aforesaid, and its successors, shall pay the net income thereof in each year perpetually, to said Public Schools of the City of, and that said net income be used and expended by the Board of Education of said Public Schools according to its discretion, for the support and maintenance of the Public Library.

30. I give, devise and bequeath said Public Schools of the City of, the sum of dollars, which sum shall be used and expended by the Board of Education of said Public Schools in the purchase of pictures of the best kind, to be placed and kept in said Public Library.

31. I give and bequeath to the City of the sum of dollars, in trust, however, to be invested and re-invested from time to time, by the Mayor and Common Council of said city, in such manner as they may determine, and to use and expend the net income therefrom annually, or so much thereof as may be necessary, forever, in caring for and keeping in order the cemetery grounds and mausoleum on the same in Evergreen Cemetery in said city, where my deceased relatives are now buried. And if the income from said trust fund in any year is more than sufficient for the purpose aforesaid, I then will and direct that the residue thereof shall be expended in taking care of lots in said cemetery owned by non-residents of the city of, which have been neglected and need care.

32. I have caused the life of, mentioned in my said will, to be insured in the.....

.....Insurance Company of
for the sum of dollars for which said
.....Insurance Company has issued its policy
No., dated Said policy is
payable in twenty (20) years, and the annual premiums are
..... dollars. I hereby give, devise and be-
queath the sum of dollars to the said The
..... Trust Company and, as
trustees, for the following uses and purposes, viz: Said
trustees shall hold and invest the same and use so much of
the income thereof as may be necessary to pay the premiums
in each year on said policy until the same matures either by
the death of said or the expiration
of said period of twenty years. Any dividends payable on
said policy by said Insurance Company shall be applied in
paying said premiums, and the net income from said sum
hereby set apart, or so much thereof as shall be necessary,
shall be used in paying the residue of said premiums, and
if the income from said fund shall not be sufficient in any
year to pay said premium, I then will and direct my execu-
tors to pay the same out of any other funds belonging to
my estate, it being my intention to keep said policy in force
for the benefit of said When said
policy shall have matured either by the death of said
....., or by the lapse of time, as aforesaid, the
trust hereby declared in respect of said sum of
dollars shall come to an end, and said sum shall be paid by
said trustees to my executors and shall become part of my
general estate. Until said sum shall actually be set apart
and paid over to my trustees and a sufficient income de-
rived therefrom, I will and direct that my said executors

shall pay the premiums on said policy less any dividends thereon, as aforesaid.

33. All the rest and residue of my estate of whatever name, kind or nature, is hereby designated as my "residuary estate," and shall be disposed of in the manner hereinafter provided.

34. I give, devise and bequeath the equal undivided one-half ($\frac{1}{2}$) of my residuary estate to the said The Trust Company and, as trustees, and to their successors in trust, however, for the following uses and purposes, viz: said Trustees shall hold and invest the same and pay the net income thereof to my wife, during her natural life, in quarter yearly payments. I will and direct that my wife may, by her last will and testament, dispose of one-half ($\frac{1}{2}$) of the principal of the trust estate mentioned in this clause of my will, to such persons or corporations, and for such purposes and objects as she may desire, the same as if it was absolutely her own property, and also that she may, by her last will and testament, dispose of the other half of the principal of said trust estate, to the Public Schools of the City of, for the enlargement, furnishing, equipment, support and maintenance of the Public Library and the Manual Training School, hereinbefore mentioned, or either of them, and to such charitable or benevolent organizations or uses, and to such Churches or Church societies, in the said City of, or any or either of them, as she may, by her last will and testament, appoint; and my said wife may exercise the power herein given to her, either by a direct bequest to the beneficiaries, or any of them, or by a valid trust in their favor respec-

tively. And I give, devise and bequeath, from and after the death of my said wife, all of said trust estate mentioned in this clause of my will, which my said wife shall not dispose of or appoint by her last will and testament as aforesaid, to the said The Trust Company, in trust, to hold and invest the same forever, and I direct that the said The Trust Company as trustee, as aforesaid, and its successors, shall pay the net income thereof, in each year perpetually, to said Public Schools of the City of, and that said net income be used and expended forever, by the Board of Education of said Public Schools, according to its discretion, for the enlargement, furnishing, equipment, support and maintenance of the said Public Library and the Manual Training School, or either of them.

35. I direct that any indebtedness which my adopted daughter,, or her husband,, or both of them, may be owing to me or to my estate shall be included in and form a part of an equal undivided one-quarter of the entire of my residuary estate, and I give and bequeath all such indebtedness to said I give, devise and bequeath to said The Trust Company and to said, as trustees, the remainder of said equal undivided one-quarter of the entire of my residuary estate, and if said and shall not be indebted to me or to my estate, then and in such case I give, devise and bequeath to said The Trust Company and to said, as trustees, all of said equal undivided one-quarter of the entire of my residuary estate instead of the remainder thereof, as above mentioned. The

bequest mentioned in this paragraph is in trust, however, for the following uses and purposes, viz: Said trustees shall hold and invest the same and pay the net income thereof to said for and during her natural life in semi-annual payments, or oftener if convenient. I give, devise and bequeath the said remainder of said equal undivided one-quarter of the entire of my residuary estate, or all of said equal undivided one-quarter, if there shall be no indebtedness as aforesaid, from and after the death of said, to her children, to be divided equally between them, share and share alike. If any child or children of said should die in her lifetime leaving lawful descendants surviving at the time of the death of said, I give, devise and bequeath the share of the child or children so dying, to his, her or their said descendants; said descendants to take by right of representation the share which their deceased parent would have been entitled to if alive. If said should leave no child or children or descendants surviving at the time of her death, I then give and bequeath all of the legacy mentioned in and bequeath by this clause of my will, from and after the death of said, to said The Trust Company in trust to hold and invest the same forever. And I direct that said The Trust Company, as trustee as aforesaid, and its successors, shall pay the net income thereof in each year perpetually to said Public Schools of the City of, and that said net income be used and expended forever by the Board of Education of said Public Schools according to its discretion, for the enlargement, furnishing, equipment, support

and maintenance of the said Public Library and the Manual Training School, or either of them.

36. I give, devise and bequeath to my friend and partner,, the remaining equal undivided one-quarter ($\frac{1}{4}$) of the entire of my residuary estate.

37. I will and direct that none of the legacies given in and by the sixth (6), seventh (7), eighth (8), ninth (9), tenth (10), twelfth (12), fifteenth (15), eighteenth (18), nineteenth (19), twentieth (20), twenty-first (21), twenty-second (22), twenty-third (23), twenty-fourth (24), thirty-fifth (35) and thirty-sixth (36) clauses of this will shall lapse. In case I survive the legatees named in said several clauses, or any of them, I then will and direct that the legacy given to such deceased legatee shall be paid to such persons and in such proportions as would, by the laws of Michigan, be entitled to the personal estate of such deceased legatees, excepting, however, the devise of real estate to my aunt,, in the twelfth (12) clause of this will, which I give and devise, in case of her death occurring during my life-time, to her heirs-at-law.

38. I will and direct that the legacies given in and by the thirteenth (13), fourteenth (14), sixteenth (16), and seventeenth (17) clauses of this will shall severally lapse in case I survive the respective legatees named therein .

39. It is my will that the legacies given in and by the sixth (6), seventh (7), ninth (9), tenth (10), twelfth (12), thirteenth (13), fourteenth (14), fifteenth (15), eighteenth (18), nineteenth (19), twentieth (20), twenty-first (21), twenty-second (22), twenty-third (23), twenty-fourth (24), twenty-fifth (25), twenty-sixth (26), and

twenty-seventh (27) clauses of this will and the endowment fund mentioned in the twenty-eighth (28) clause of this will, shall severally bear interest at the rate of five (5) per cent. per annum from the date of my decease, to be paid semi-annually to the several legatees. I direct that all other legacies given in this will be paid as soon as convenient to my estate, but without interest.

40. I do authorize and empower the several trustees herein named, and their successors, to hold and invest the several trust estates mentioned in this will, in such securities and property as they may deem judicious, and to take possession of, manage and control the same, and receive the income, rents and profits thereof, and to vary and change the investments of the several trust estates from time to time during the continuance thereof, as to it or them shall seem proper, and said trustees shall be entitled to reasonable compensation for executing the trusts of this will.

41. I hereby declare that the provisions made in this, my will, in favor of my wife,, are, and are intended to be, in full satisfaction and recompense of and for her dower and thirds, which she may or can in any wise claim or demand of my estate; and also in full satisfaction of her share in my personal estate.

42. If any devisee, legatee or beneficiary under this will, or any codicil thereto, shall contest the same, or oppose the probate or allowance thereof, I then, in such case, hereby revoke and cancel all the legacies, devises, and provisions of my will and codicil in favor of any such person; and it is my will that such person shall have no part of my estate, and in such case I give and bequeath all that portion of my estate, which I have given to such person in and by this will

or any codicil thereto, to said The Trust Company, in trust, to hold and invest the same forever, and I direct that said The Trust Company as Trustee, as aforesaid, and its successors, shall pay the net income thereof, in each year, perpetually, to said Public Schools of the City of, and that said net income be used and expended forever, by the Board of Education of said Public Schools, according to its discretion, for the enlargement, furnishing, equipment, support and maintenance of the said Public Library and the Manual Training School, or either of them.

43. Should any or either of the provisions, or directions, of my said will, or of any codicil thereto, fail, or be held ineffectual or invalid, for any reason, it is my will that no other portion, provision or direction, of my said will, or any codicil thereto, be invalidated, impaired or affected thereby, and that said will and any codicil thereto, shall be treated and construed as if said invalid provision or direction had not been contained therein.

44. I will and direct that for and toward the performance of my said last will and testament and any codicil thereto, my said executors and trustees may bargain, sell, alien and convey in fee simple all my lands and other property which I may own at the time of my decease or have any interest in, except my said homestead; and also all other lands and property which my said executors and trustees, either as executors or trustees, or both, shall acquire any title or interest in or to, after my decease, and may make, execute, acknowledge and deliver all such deeds, contracts and other instruments as to my said executors and trustees, or to their counsel learned in the law, shall seem fit or necessary,

and all such sales may be upon such terms and credit and security, and in such manner, as to my said executors and trustees shall seem meet, but this power, so far as it affects the co-partnership lands and property of the firm of
....., is given subject to the provisions and directions contained in the fourth (4) clause of this will.

45. I hereby nominate and appoint the said The Trust Company of, Michigan, and of said City of, to be the executors of this my last will and testament; and having unbounded confidence in their integrity and business capacity, I hereby request that they may not be required to give bonds, either as executors or trustees, and I hereby waive all such bonds. And I will and ordain that all the discretion, authority and power hereby given to them jointly, as executors and trustees, shall enure and vest in their successors as executors of and trustees under this will. I further will and declare that if either said The Trust Company or should refuse to act as joint executors and joint trustees as aforesaid, or should die, resign, or for any other reason a vacancy should happen as to one of them, all the estate, trust, power, discretion and authority in and by said will reposed in and make exercisable by them jointly, shall in such case be reposed in and executed and exercisable by the other alone and his or its successor or successors.

46. In any case where I have named The Trust Company as sole trustee, if that Company should refuse to accept, resign, or cease to do business, or become incapacitated for the proper performance of its duties, as such trustee, or a vacancy should occur in any manner, a

new trustee may be appointed by any court of competent jurisdiction, which trustee, or its successors, shall have all the power herein given to the said The Trust Company, and said trustee shall be some solvent and well established corporation, duly authorized and empowered by the law to accept and perform trusts of this character; and as often as a vacancy shall occur a new trustee of like character shall be appointed in the manner and with the powers aforesaid.

47. I hereby revoke all former wills by me at any time made.

In Witness Whereof, I have hereunto set my hand and seal thisday of in the year of our Lord one thousand nine hundred and

..... (L. S.)

The above instrument, consisting of seventeen (17) pages written in typewriting, each authenticated by the signature of said testator,, in our presence, was, at the date thereof, signed, sealed, published and declared by the said as and for his last will and testament, in the presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto this day of, A. D. 19.....

....., Mich.
 Mich.
 Mich.

No. 82. Will of Mr. Simon J. Murphy, Containing: General and Special Legacies and Devises, Advancements, Provision to Set Apart Estate, Provision for Continuation of Business, Provision in Lieu of Dower, Trusts, Codicil, Charitable Trusts, Annuities, etc.

I,, of the City of, County of, and State of, being of sound and disposing mind, do make and declare this to be my last Will and Testament, hereby revoking all other wills by me at any time made.

After the payment of all my just debts and funeral expenses, I give, devise and bequeath all the estate, real, personal or mixed, in which I may have any interest, at the time of my decease as follows:

Article First:

I give and devise to my beloved wife,, in fee, if she survive me, all and singular those lots of land situate in the City of, aforesaid, being lots, (...), (...), (...), (...), the feet of lot of Subdivision of lots, together with the vacated alleys adjoining, with all the hereditaments and appurtenances thereunto belonging. And I give to my said wife all the horses, carriages, household furniture, and personal property, in or upon said property, and used by us in and about our homestead.

Article Second:

I give to my said wife (\$.....) Dollars; she knowing that my custom has been to aid her

and my deserving relatives. I believe she will continue to do so with such sum, but no legal obligation is hereby imposed upon her. In case she does not survive me the devise and bequest in Articles One and Two shall become a part of the rest, residue and remainder of my estate specified in Article Fourth and is to be held and disposed of under said Article.

Article Third:

I give, devise and bequeath to my Executors and Trustees, hereinafter named, the survivor or survivors of them, (...) of my property and estate (first excepting therefrom, however, such part thereof as is designated and disposed of by Articles One and Two of this my Will), in trust, nevertheless, to have and to hold the same for the following declared uses and purposes, to-wit: to hold, care for, manage, control, invest and reinvest the same, and to pay to my son,, during his lifetime, the net annual income, or such portion thereof, as in their judgment is sufficient for the suitable maintenance and support of himself and family, and for the education of his child, and should there be any surplus of such net annual income remaining in the hands of my Executors and Trustees, then to pay such surplus to my said wife,, so long as she may live after my decease, but in case my said wife should not survive me, or upon her death after my decease, to pay such surplus of said net annual income to my children then surviving, other than my said son,, and the issue of any deceased child, such issue of deceased child to take by right of representation, and upon the death of my said son,, to pay, turn over

and convey a (..) of said Trust estate to his daughter,, to have and to hold the same to her, her heirs and assigns forever, and to pay, turn over and convey the balance of such trust estate to my children then surviving, and to the issue of any deceased child, such issue to take the same portion his or their parent would have taken if living, save only, that in such case the said, or other issue of his, shall not participate in such division, but such balance of said Trust estate shall be so divided and distributed as if my said son,, had died without issue. In case the said shall not be living at the decease of her said father, then my said Trustees, or the survivor or survivors of them, shall pay, turn over and convey said Trust estate to my children, then surviving, and to the issue of any deceased child, such issue to take the same portion his or their parent would have taken if surviving, save only, that in such case, if my said son, shall leave any issue, such issue shall not participate in such division, but such trust estate shall be so divided and distributed as if my said son,, had died without issue. The Trust created by this Article of my will is, however, expressly made subject to the right in my said Executors and Trustees, or the survivor or survivors of them, at their discretion, at any time during the life of my said son,, when, in the exercise of their sound discretion, they shall deem it safe and prudent so to do, to pay, turn over and convey the said Trust estate to my said son,, absolutely, to have and to hold the same to him, his heirs and assigns forever; and upon such payment, turning over and convey-

ing of such Trust estate to my said son,, the trust created by this Article shall cease and terminate, and all trusts and duties connected with such Trust estate, committed to, or imposed upon, my said Executors and Trustees, the survivor or survivors of them, shall be fully performed, fulfilled and discharged anything herein contained to the contrary thereof in anywise notwithstanding. I hereby give to my Executors and Trustees, the survivor or survivors of them, full power and authority in the management of the trust committed to their care by this Article of my Will, to sell or lease said Trust estate, or any part thereof, in their discretion, and to make, execute and deliver all needful Instruments thereof.

Article Fourth:

I give and devise to of,, my son, and of,, and survivor or survivors of them, whom I hereby appoint as my Executors and Trustees, the rest and residue of my estate, real, personal, and mixed, remaining in trust for the following purposes:

1st. To take possession (except as otherwise herein provided) of all and singular thereof, to manage, control and protect the same, for the benefit of my estate, according to their best judgment.

2nd. To continue and carry on the partnerships, in which I am a partner, and the Corporations in which I am a stockholder, and to renew the same, if necessary, for the best interests of my estate, to accomplish the purposes for which they were formed, and to dissolve the same, if, in their judgment they think they should be dissolved, and to settle such partnerships and corporations, and to close the

same, but such partnerships and renewals thereof are not to exceed a period of ten years after my decease.

3rd. To carry out and perform all contracts made by me for the sale of any property and to give all necessary deeds in performance thereof, and to give and execute all necessary discharges of Mortgages, Contracts, and debts owing to me, on payment thereof.

4th. At their discretion, to grant, bargain, sell, lease, contract, and convey, all and singular, my interests in any personal property or lands which I may own, on such terms and conditions as they deem best for the interest of my estate, and to divide, partition and convey all lands and property, owned by me with others, as a partner or otherwise, to the end that my interests may be separate and distinct.

5th. To collect and receive all rents, profits and income of my estate, and moneys arising from sale of property, and pay to my wife, such sum or sums of money as she may, from time to time, require for her support and to maintain her household and homestead, and to advance to my children, and in case of the death of any of them, then to their children, such sums of money as my Executors and Trustees, shall think proper—all such advancements being first paid out of the net rents and profits of the real estate belonging to my said estate, until such rents and profits shall be exhausted; and I direct that such advancements shall at least equal in amount the total income from the net rents and profits of the real estate which shall remain in my estate; and such moneys as I have advanced and charged, or may advance and charge, to any of my children, and the moneys my Executors and Trustees may advance to them, or their

children, together with interest thereon from the time of such advancements, shall be accounted for and taken as a part of their share of my estate, in the distribution as hereinafter provided.

6th. My Executors and Trustees are authorized to invest and re-invest on interest on such security as they shall deem safe, or invest in real estate if they think proper, any surplus money in their hands and to sell and convey such real estate, or otherwise.

Article Fifth :

I desire my Executors and Trustees to manage my estate, and I give them full power to do any act or thing, proper and necessary in and about all matters for that purpose, that at the expiration of (..) years, or upon the death of my two sons, and, at any time prior thereto, then upon the death of the last one of my said two sons so dying, my estate shall be divided and closed, and my estate being then vested and remaining in my Trustees, under the provisions hereof, be then distributed, delivered and conveyed as follows, to-wit:

1st. To my said wife, if then surviving, (..) thereof of all my estate, both real and personal, in addition to the devise and bequest heretofore made to her, and to be in full and stead of dower.

2nd. To divide my estate remaining into equal shares, and to separate and set apart one share to be divided equally between my son, his wife,, and his son,, share and share alike.

3rd. To separate and set apart one share thereof, the same to be given to my son,, for

his use and benefit, for and during his lifetime, with remainder over to his children in equal shares; and in case of his death prior to the distribution of my estate, such share shall be paid, turned over and conveyed to his children, and to their children, by right of representation, in equal shares.

4th. To each of my other children, then surviving, to-wit: my daughter,, and my son,, and, and to the lawful issue of them, dying prior thereto, such issue to take and have such part as the parent thereof would take if living, one equal part and share of my estate so remaining.

Article Sixth:

In making any distribution of lands remaining, I desire the same may be made amicably, if possible, and if such distribution cannot be made amicably, then that my executors and trustees, or the survivor or survivors of them, make such division and distribution, taking into consideration the situation, value and availability thereof, according to their best judgment.

Article Seventh:

In case of the death of my wife, or the death of any of my children without lawful issue, before said distribution shall be made, then the part and share of such deceased shall be conveyed and distributed to my other children, and the issue thereof, in the manner and as specified in "Article Fifth" of this my Will, excepting as herein otherwise provided, and expressly excepting from the operation of this Article of my Will, that portion of my estate disposed of under Articles First and Second.

Article Eighth:

I do not require my Executors and Trustees to give any Bonds or Security, except as may be necessary to comply with the law, but I do require them to prepare and furnish to each of the parties interested as beneficiaries herein, each and every year, a true, full and correct account of all moneys received by them, from whom, and the source thereof and of all moneys paid out by them, and to whom paid, and of the moneys on hand, and such other statements as shall explain the true situation of my estate.

Article Ninth:

I hereby direct in case any of my devisees, either directly or indirectly shall institute, or promote, aid or abet, any contest over the probating of this my Will, or over the validity of any of the provisions thereof, then, in that event, that such devisees shall forfeit and lose all and every right, interest, or estate, devised or bequeathed to him, her or them, by this my Will, and in such case, upon the distribution of my estate as directed herein, such right, interest or estate, shall be added in equal portions to the several shares or interests, bequeathed or devised to my other devisees respectively, the same to all intents and purposes as if said equal portions were a part of the share or interest originally, by the terms of this my Will, devised or bequeathed to such other devisees respectively and no provision whatever, had been made in this my Will for the benefit of the devisees, so instituting, promoting, aiding or abetting, such contest.

The words "of them" in line 15 and the word "annual" in line 31 on page "2" were inserted before the execution of this instrument. The words "and my estate" in line 10

and the word "share" in line 22 on page "8" were inserted before the execution of this Instrument. The word "any" in line 19 on page "10" was inserted before the execution of this Instrument.

In Witness Whereof I have hereunto signed my name and affixed my seal this day of, A. D.

(Sgd.) (....).

The foregoing Instrument written upon eleven pages of paper was signed, sealed, published and declared, by the said, as and for his last Will and Testament, in the presence of us, who, at his request, in his presence, and in the presence of each other, have subscribed our names as Witnesses thereto. The words "personal property or" in line 16 on page "6" were inserted before the execution of this Instrument.

(Sgd.), of,

(Sgd.), of,

CODICIL.

On account of the death of my beloved wife,
, which occurred on the
 day of,, and desiring to carry out her wishes in respect to some of the charities in which she was interested, and to perpetuate in some measure, the good cheer with which she inspired her associates in helping the unfortunate, and in order to make certain changes or alterations in the distribution of my property, it is necessary that I make some changes and alterations in my last Will and Testament.

I, therefore,, of the City of
, County of, and State of,

being of sound and disposing mind, do make and declare this to be a codicil to my last Will and Testament, dated, and to which this is attached, hereby establishing and confirming my said last Will in every particular, except as changed or altered by this Codicil.

Article First:

The Real Property, the one-third interest in my estate, and all other devises or bequests, which were given to my said wife, in my said last Will, shall be and remain a part of the residue and remainder of my estate, as provided in my said Will, and shall be distributed in the manner set out in my said Will, except as herein otherwise provided.

Article Second:

I give and bequeath to the following charitable institutions of the City of, sums of money as follows, to-wit: To the Children's Free Hospital, (\$.....) Dollars; to the Home for the Friendless, (\$.....) Dollars; To the Thompson Home for Old Ladies, (\$.....) Dollars; To the McGregor Mission, (\$.....) Dollars, each of these several funds to be known as the "..... fund," and to be invested by the Trustees of the several Institutions in safe, income producing property, the annual income of the same to be used by them in the future maintenance and support of the Institution. Said sums to be paid to the several Institutions, by my said Executors and Trustees, without interest, at the time of the final distribution of my estate, as provided by "Article Fifth," of my said last Will, or, to any one or more of them, the sum so given to it may be paid at any time prior to said time of distribution, if, in

the judgment of my said Executors and Trustees, it may be convenient or desirable to do so.

Since I have been permitted to aid in relieving the First Universalist Church Society of Detroit from its indebtedness, and by furnishing about \$....., to complete the payment of all incumbrances upon its building and lot, I do not deem it necessary to add anything to my gifts to that Institution.

Article Third:

Of my household effects in the homestead, I desire that certain parts or portions of them may be distributed among my children, as it was the wish of my beloved wife that they should be; such distribution to be made by my executors and trustees as soon after my death as convenient.

1. To my son,, I give and bequeath all the furniture, tapestries and bric-a-brac belonging in the room formerly occupied by my beloved wife and familiarly known as her room; also one-half of the books known as the "..... Books; also the picture entitled "....."
2. To my son,, I give and bequeath one-half of my said "..... Books;" also the picture entitled the ".....," and in case of his death, these articles to be given to my son,
3. To my son,, I give and bequeath one of my easy chairs; the picture entitled "....."
4. To my son,, I give and bequeath one of the leather covered rocking chairs; also the picture entitled "....."

5. To my son,, I give and bequeath one of the easy chairs, also the picture entitled ""
6. To my daughter,, I give and bequeath the picture entitled "," by and the "," by Also her choice of any of the articles of furniture, tapestries, china-ware, glass-ware, bric-a-brac or other property used in or about the homestead, (not otherwise herein specifically disposed of), which she may wish or desire to keep, or for her use in furnishing or fitting up her own home.

Article Fourth:

I give, devise and bequeath to my son,, his successor or successors, the sum of (\$) Dollars, in trust nevertheless, for the following purposes, to-wit:

1. To care for, manage, control, invest and reinvest the same according to his best judgment or of the judgment of his successor or successors, hereby giving and granting to him or his successor or successors, full power to buy real estate, and to sell and convey the same should any such transactions appear to be necessary for the best interests, or for the protection of the fund, and from the net annual income thereof to pay certain sums of money as hereinafter directed.
2. To, of, (\$) Dollars per year.
3. To, of, (\$) Dollars per year.

4. To, of,,
..... (\$.....) Dollars per year.
5. To, of,,
..... (\$.....) Dollars per year.
6. To, of,,
..... (\$.....) Dollars per year.

These annuities to be paid at such times and in such amounts as my said Trustee, his successor or successors, shall deem best or most expedient, the same to be given to said annuitants and accepted by them, in lieu of any such or any similar amounts given, or intended to be given, to them by my beloved wife, and it is my wish, and I hereby direct, that in case the net income from said fund shall, during any one year, amount to more than the total of the sums herein directed to be paid to said four annuitants last above named, that such surplus, in excess of the amount required to pay said annuities, be added to the fund, and the total amount be kept intact, in order to insure the payment of said annuities but should said net annual income be less than the sum of the total of said annuities, then such income shall be paid to said annuitants in the same relative proportions as if the full amount had been received. Provided, however, that whenever, in the discretion of my said Trustee, his successor or successors, any part of said fund shall not be required for the production of sufficient income to pay said annuities, such portion of said fund as shall not be so required, may be treated by my said Trustee, his successor or successors, as a part of the rest and residue of my estate, and may be distributed by him in the same manner as provided for the distribution of the residue and remainder of my estate, by my said last Will and upon the

death of the last one surviving of said annuitants, all that remains of said fund and its accumulations, if any there be, shall be treated and distributed in the same manner. Provided, further, that the expenses of the last illness, and the funeral expenses of each of said annuitants, may be paid from the income of said fund, or from the fund itself, in the discretion of my said Trustee, or his successor, or successors.

Article Fifth:

I desire to change the method of the distribution of a portion of my estate, as set out in "Article Fifth" of my said last Will, in the following particulars, to-wit:

It is my Will, and I hereby direct, that "one equal part or share of my said estate so remaining," which is directed to be paid to my daughter,, in Sub-paragraph "4th" of said "Article Fifth," be given, surrendered, granted, conveyed and paid over to my son,, in trust nevertheless for the following purposes, to-wit:

1. To manage, control, invest and re-invest the same according to the best judgment of my said Trustee, his successor or successors, hereby giving and granting full power and authority to invest the personal property or moneys, in real estate, to sell real estate, and to do any other act or thing, which may appear to my said Trustee, his successor or successors, to be necessary and for the best interests of said Trust Estate.
2. To pay to my daughter,, such sum or sums of money, from the income thereof, as my said Trustee, his successor or successors, may

deem best and most expedient, the same to be paid at such time or times each year, as she may desire, for and during her life time, it being my wish that she shall be as liberally supplied with funds, and kept as free from care, worry, or trouble, arising from the care or management of property as she has been during my life time, and I direct that the sum or sums so paid to her shall at least equal the total net annual income from the rents and profits of any and all real estate belonging to said trust estate.

3. Upon the death of my said daughter, it is my will and I hereby direct, that all the rest, residue and remainder of said trust estate, be distributed by my said Trustee, his successor or successors, among my heirs, in the manner provided for the distribution of the residue and remainder of my estate in my said last will, except as changed or modified by this codicil.

Article Sixth:

I wish to have it expressly understood whenever the word "income" is used in my said last will, or in the codicil, that the meaning of said word shall not be understood as including any increase in the value of a fund or investment, to which it may refer, but only the annual net amount actually received from said fund or investment; and I also wish and direct that "Article Ninth" of my said last Will shall be taken, and understood to apply to each and all of the devisees named in this codicil.

I further desire to, and I do hereby cancel and erase that portion of "Article Seventh" of my said Will beginning on line (3) on page (10), and extending to the end of said

Article as follows: "Articles first and Article Second" and to substitute therefore the following, to-wit; "Article Third."

In Witness Whereof, I have hereunto signed my name and affixed my seal, this day of, A. D.

..... (SEAL).

The foregoing instrument, written upon pages of paper, was signed, sealed, published and declared by the said, as and for a codicil to his last Will and Testament, in the presence of us, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

....., of,
 of,

CONSTRUED WILLS.

- No. 83. The Warriner Will.
- No. 84. The Ferris Will.
- No. 85. The Railer Will.
- No. 86. The Kingman Will.
- No. 87. The Dostie Will.
- No. 88. The Hibler Will.
- No. 89. The Stebbins Will.
- No. 90. The Ford Will.
- No. 91. The Smith Will.
- No. 92. The Averling Will.
- No. 93. The Sibley Will.
- No. 94. High Will, a Letter.
- No. 95. Will, no Beneficiary named.
- No. 96. The Palms Will.

No. 83. The Warriner Will.

Gaskill v. Weeks, 154 Mich. 224. Last part of second paragraph construed so as to mean that the children shall share equally with the children of the brothers and sisters.

I,, of the city of
and State of, do hereby make and publish this
my last will and testament thereby intending to dispose of
all my worldly estate of which I shall be possessed at the
time of my demise. I direct that all my just debts includ-
ing funeral expenses and expenses of administration be paid
out of my estate. The residue and remainder of my estate,
both real and personal, I devise and bequeath to,
....., and, my executors,
hereinafter named, in trust for the following purposes:

First. To my wife,, during her
natural life the net income of my estate and in case such
income shall not be sufficient to suitably support her to use
and appropriate sufficient of the principal of my estate for
that purpose.

Second. After the death of my wife and the payment of her funeral expenses to convert my remaining estate into money and divide the same between all the children of my brothers and sisters and then living share and share alike, and in case any of said children shall die leaving issue living at the time of the distribution of my estate such issue shall take the share of their deceased parent.

I hereby appoint,,
and, executors of this my last will
and testament and revoke all other wills by me at any time
made.

In witness whereof I have hereto set my hand this
day of, A. D.

Signed by the testator,, as and
for his last will and testament in the presence of us, who,
at his request, in his sight and presence and in the presence
of each other, have subscribed our names as attesting wit-
nesses this day of, A. D.

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.....

No. 84. The Ferris Will.

Trustees v. Wood, 145 Mich. 261. The doctrine of pre-
catory trusts has no application in this case.

After the payment of all my just debts and funeral ex-
penses, I give, devise and bequeath to my beloved wife,
....., should she survive me, all my real
and personal property of which I may die possessed, of
every kind, name and nature whatsoever.

Should my wife,, not survive me,

then it is my will that my executor dispose of all my property, both real and personal, and apply the proceeds thereof as follows:

First, I give and bequeath to, of, county,, the sum of dollars (\$.....).

Second. To, of county,, I give and bequeath the sum of dollars (\$.....).

Third. To church of the City of, county,, also known as '.....,' I give and bequeath the sum of dollars (\$.....), provided that the Church shall deliver up for cancellation a certain note given by me and held by it.

Fourth. All the rest, residue and remainder of my estate I give and bequeath to the trustees of College, in the city of, county of and State of Michigan, said sum to be held and invested by the trustees as a perpetual fund, the principal of which shall forever keep inviolate and the income thereof shall be used under the direction of said board of trustees for the purpose of aiding needy and deserving young men who are studying for the work of the ministry in the Churches and other evangelical churches. Should my wife,, survive me, then, as hereinbefore stated, all of the foregoing bequests shall be held to be null and void and my entire estate, both real and personal, is hereby given and bequeathed absolutely to her, but it is my request that she shall, either before her death by gift, or in such other manner as she shall deem proper or

after her death by will, transfer, grant and give to the foregoing legatees the sums and amounts hereinbefore set forth out of whatever may remain of the proceeds of my property, real and personal, over and above what she may have used, or desire to use, during her lifetime, for her own maintenance, or for other purposes to which she may desire to apply it.

No. 85. The Railer Will.

Pray v. Railer, 144 Mich. 208. In this case the intention of the testator was construed to mean that income should be divided equally among all the residuary legatees.

Item First. I hereby give, devise, and bequeath unto my children hereafter named, the sum of dollars (\$.....) each, viz.,,, and, to be paid to them by my executor at the time when my youngest child which shall then be living after my decease, shall arrive at the age of years, and in case I shall live until after my youngest child shall have arrived at the age of years, then within one year after my death.

Item Second. I hereby give, devise and bequeath unto my daughter,, the sum of dollars (\$.....), to be paid to her by my executor at the time my youngest child which shall then be living after my decease shall arrive at the age of years, and in case I shall live until after my youngest child shall have arrived at the age of years, then within one year after my death.

Item Third. I hereby give, devise and bequeath all the rest, residue and remainder of all my real and personal estate wheresoever situate, to my children,,, and,

to be divided equally among them, share and share alike, at the time when my youngest child then living after my decease, shall arrive at the age of years, and in case I shall live until after my youngest child shall have arrived at the age of years, then said property to be divided among the legatees in this item named within one year after my decease.

Item Fourth. In case I shall die before my youngest child then living shall have arrived at the age of years, I direct that the four children named in the third item of this will shall be allowed to use and occupy all the real estate of which I may die seized, and have the use of all the personal property of which I may die seized, after the payment of my just debts, funeral expenses and costs of administration, until such time as the youngest one of my said children then living shall have arrived at the age of years, and I request that my son,, continue to reside upon the real estate now owned by me, and provide a home and support for his younger brother and sisters until such time as they shall have arrived at the age of years, and in case my son,, shall refuse or neglect to furnish such home and to continue to reside upon such real estate for that purpose, that then my executor shall see to it that the use, rents and profits of said real and personal property of which I may die seized be used for the support of my said children, mentioned in item three of this will, until such time as they shall become of the age of years.

I hereby appoint, of township, county of, and State of, executor of this my will.

No. 86. The Kingman Will.

Packard v. Kingman, 109 Mich. 499. Executors granted power, for the benefit of the estate, to execute negotiable paper, to mature within the limits of the trust, and without personal liability.

First. After the payment of my just debts and funeral expenses, I give, devise, and bequeath unto, and, all of county,, and, of the city, county, and State of (the executors of this, my will, hereinafter named), and to the survivors and survivor of them, or to such of them as may from time to time qualify as such executors, and to their successors and assigns, all of my estate and property, real and personal, and mixed, of whatsoever kind and description, and wheresoever situate, in trust, nevertheless, for the uses and purposes following and herein stated, and no other, that is to say: That my said executors take possession of all my said estate and property as aforesaid, and to hold the same, and to collect the rents and profits thereof arising from my said estate and property during all the time they hold the same; and to sell and dispose of my said estate and property, or of so much and such parts thereof as they may deem for the best interests of my estate; and to invest my said estate and any of the income thereof in such manner as they shall deem judicious, and in such securities as they may see fit; and to reinvest the same so often as may be necessary; and that such securities may be other than those prescribed by statute or law for the investment of trust estates, any statute or law to the contrary notwithstanding. And I do hereby give to my said executors, or to such of them as may from time to time qualify as such executors, and to their successors and assigns, full power and authority to grant,

alien, bargain, sell, convey, mortgage, lease, and assure all or any of my said estate, real, personal, and mixed, to any person or persons, and their heirs and assigns, forever, by all and every such lawful ways and means in law as to them and their counsel learned in the law shall seem fit or necessary. And in case of sale of any part of my said estate, whether real or personal, I direct that it may be either at public or private sale, as to my said executors may seem best and most judicious; and in carrying out the provisions of this, my will, I hereby authorize and empower my said executors to make, execute, and deliver all necessary deeds, mortgages, leases, releases, and other papers (provided that nothing herein contained shall authorize my said executors to lease any of my real estate beyond the time herein fixed for the termination of this trust). Out of the interests, incomes, and profits which shall accrue from my estate so held in trust as aforesaid, I will and direct the following sums to be paid to my wife and children, in semi-annual payments, during the continuance of the trust herein, and I give, devise, and bequeath to my said wife, and children out of said interests, incomes, and profits as follows, to-wit: To my wife,, the sum of dollars per year; to my daughter,, the sum of dollars per year; to my son,, the sum of per year; to my son,, the sum of per year. Should my said wife or any of my said children die during the continuance of this trust, her or his portion or share of said interests, incomes, and profits shall be paid to her or his heirs and assigns. The trust herein and hereby created in this clause

of my will shall terminate five years from the date of the probating of my will in the county of which I may die a resident; and my object in creating the aforesaid trust is in order that my estate may be kept together in the manner herein provided until my various business interests can be closed up advantageously to my said estate, and administered upon by my executors and trustees for the best interests of my wife and children, and judging that that length of time will be necessary so to do.

Second. Upon the termination of the trust created in the preceding clause of this, my will, I hereby direct my executors and their successors, and their successors, and the survivor and survivors of them, or such of them as may from time to time qualify, and to their successors, to divide my said estate and property into four equal portions. And I hereby give, bequeath, and devise the first part or portion thereof to my said wife,, and her heirs and assigns, forever; and the second part or portion thereof to my daughter,, and to her heirs and assigns, forever; and the third part or portion thereof to my son,, and to his heirs and assigns, forever; and the fourth or remaining part or portion thereof to my son,, and to his heirs and assigns, forever.

Third. The legacies and bequests hereinbefore made to my said wife,, are made to her, and are to be by her received, in lieu of all rights of dower, homestead, and support.

Fourth. I hereby nominate and appoint,, and, all of said county of,, and, of

the city, county, and State of, and the survivors of them, or such of them as shall at any time qualify, to be the executors of this, my will, and trustees of my estate, as herein provided; and it is my wish and will that my said executors shall not be required to execute any bond or security for the faithful performance of their duties as executors or trustees, and they shall not be held liable for any losses to my estate except by their own willful default.

No. 87. The Dostie Will.

Wheeler v. Wood, 104 Mich. 414. The bequest was designed as a specific legacy.

Know all men by these presents that I,, of, county,, being in good health and of sound and disposing mind and memory, do make and publish this, my last will and testament, hereby revoking all former wills by me at any time heretofore made:

First. I hereby direct the payment of all my just debts and funeral expenses and the legacies hereinafter given out of my estate.

Second. After the payment of my said debts and funeral expenses, I give and bequeath to my niece,, of, county,, the sum of \$

Third. I give and bequeath to my nephew, the sum of \$, the said \$ to be paid by my executor assigning and transferring to the said a certain real-estate mortgage upon the farm owned by the estate of the late, which said farm is located in the township of, county of, and State of Michigan, and

which mortgage was made to me by the said
about years ago.

Fourth. I give and bequeath all the rest, residue, and remainder of my estate of which I shall die seized to my brother,, of, county, Michigan, and to my sister,, of, Michigan, share and share alike; provided that my said sister shall take no part or share of the estate hereby devised during the lifetime of her husband,, and should my death occur before the death of the said husband,, her interest in my said estate shall vest in my said brother,, as trustee for my said sister,, the said trustee to account and pay over to the said her interest in said estate at the death of her said husband, Should my said sister,, die before the death of her said husband,, then all my estate herein willed to my said sister,, shall pass to and become the sole property of my said brother,
.....

The above instrument, consisting of one sheet of caligraph paper, was now here subscribed by, the testator, in the presence of each of us, and was at the same time declared to be her last will and testament, and we, at her request, sign our names hereto as attesting witnesses.

..... county, Michigan.

..... county, Michigan.

No. 88. The Hibler Will.

Hibler v. Hibler, 104 Mich. 274. In this case the legacy did not constitute a charge upon the real estate of the testator, which he specifically devised to the legatee and another son, subject to the payment of other legacies and it did not lapse, but became vested in the legatee upon the death of the testator.

First. After all my just debts are paid and discharged, the residue of my estate, both real and personal, I give, bequeath, and dispose of as follows: To my beloved wife,, the use of all my estate, both real and personal, for and during her natural life, and after her death to be disposed of as follows, viz.: To my son, the sum of \$., this sum being the amount which I consider to be justly and equitably his due for services rendered me and the family since he became of age, and to be paid to him first out of my personal property on hand after the death of my said wife, and before any division shall be made of said personal property. The balance of my personal property, after the death of my said wife, to be divided equally among my five children, viz.,,,, and, share and share alike, if they be living at my death and after the death of my said wife; but, if either of said children shall then be dead, then, in that event, the child or children of said deceased child to take the share which their parent would have been entitled to receive by right of representation, share and share alike. The above and foregoing declared the way and manner I want all the personal property of which I may die possessed to be distributed and disposed of.

Second. And as to my real estate situated in the townships of and, in the county

of and State of Michigan, being the farm on which I now reside, and being all I own in said townships, I give and devise to my sons and, to have and to hold the same, to them, their heirs and assigns forever, upon the uses and trusts following, viz. After the death of my said wife, to pay to my son as hereinafter stated, the sum of \$..... Secondly, to pay to my daughter the sum of \$..... in one year after the death of myself and my said wife, and to pay to my daughter the sum of \$..... in one year after the death of myself and my said wife. And I hereby give to my said trustees full power and authority, after the death of my said wife, to sell any and all of my said real estate, at private or public sale, for the purpose of paying off such legacies; and after having paid the said legacies in full out of said real estate, as aforesaid, then it is my will that the rest and residue of my said real estate, or of the avails thereof, if the same shall have to be sold as aforesaid, shall be divided between my two sons and, share and share alike, to have and to hold the same in fee simple forever. The said sum of \$..... hereinbefore devised to my son is to be paid to him, or, if need be, to his legal guardian, on or before one year after the death of my said wife.

And I do hereby nominate and appoint my two sons and executors of this, my last will and testament; herein and hereby revoking and annulling all other wills by me made.

(Attestation Clause)

No. 89. The Stebbins Will.

Stebbins v. Stebbins, 86 Mich. 474. In this case a construction is given of the meaning of "means" and "all of said property" as applied in the contract. After certain bequests were paid, the balance was to be divided between two mission boards.

I desire, as soon as convenient after my decease, that all my debts and funeral expenses be paid out of my means, which may be found in the hands of, of the city of, to the amount of \$., in one note against, of dollars, and another against, to the amount of dollars; also a certificate of deposit in the Bank, in the city of,, to the amount of dollars, perhaps some more, which will be found among my papers in the hands of nephew, of the city of,; also a mortgage of dollars loaned to my brother, this mortgage being a security on the house and three lots of land on which he now lives in the city of,, and now on file in the clerk's office of said county.

Item 1. I wish my brother, and his wife,, to hold and enjoy all of said property during their natural life. The interest to be collected, if they wish, after their decease or close of life.

Item 2. After their decease, I wish the property to be sold, and the avails of said property to be divided between the Foreign Board of Missions and the Home Board of Missions, both expended on the coast, in,, as the board may think best.

Item 3. I give and bequeath to my son, , the sum of dollars, also the large family Bible, if he desires it; if not, it may be put into the hands of my granddaughter,

Item 4. I give and bequeath, as a matter of indebtedness, to my niece, now , the sum of dollars.

Item 5. I give and bequeath the sum of dollars for the purpose of raising a sum of dollars for the purpose of increasing the facilities for the education of nurses in the Hospital in the city of , now under the management of the Church of said city. If it should not be raised, I direct it to be given to the missions in the Church.

Item 6. A small note of dollars may be found against my brother ; if so, give it up to him or destroy it.

Item 7. I give and bequeath dollars to Society.

Item 8. After all debts and expenses are paid, I give the balance left, in equal sums, to the foreign and home boards of the church, unless extreme want shall be observed by my executor among my brothers and only living son. In such case I will leave it optional with him to give a portion or the whole, as he shall in his judgment decide what ought to be done.

Item 9. All my personal effects, such as books or clothing, I desire to be divided among my brothers and their families, giving my granddaughter, , the privilege of selecting from them if it is her wish.

No. 90. The Ford Will.

Ford v. Ford, 80 Mich. 42. The statute prohibiting the suspension of the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate is not violated by the direction in a foreign will, admitted to probate in this state, that Michigan lands shall be sold, and the proceeds invested in lands in another state, there to be held for a number of lives.

Know all men by these presents, that I,, of the city of, county of, and State of, being of sound disposing mind and memory, do make, publish, and declare this to be my last will and testament, in terms following, to wit:

1. I direct that all my lawful debts, funeral expenses included, shall be paid as soon after my decease as practicable, out of moneys on hand, or, if need be, from the income of my estate.

2. It is my will, and I so direct, that the necessary expenses of carrying my estate from year to year be paid from the income thereof.

3. It is my will, and I so direct, that all indebtedness from any of my brothers to me shall be, and hereby is, canceled, and the legal evidence of such indebtedness shall be returned to the makers thereof.

4. I direct that all properties in Schedule A attached to this instrument, and bearing my signature, shall be converted, as soon as practicable after my decease, into rentable 'inside' property in, at schedule prices, or as much better as may be.

5. I also direct that the several properties in Schedule B attached to this instrument, and bearing my signature, shall, at the discretion of my executors, either be sold, and the proceeds thereof be invested in more desirable renting property in, or said proceeds be used in

improving some one or more of my properties.

6. I also direct that all moneys, notes, bonds, mortgages, or other evidences of indebtedness to me from any and all parties, except my brothers, shall, as soon as practicable after my decease, be used either in the purchase of property in, or for improving properties in said city then on hand.

7. It is my will, and I so direct, that my wife,, shall have the use of my homestead, furniture and appurtenances, located on street,, so long as she may desire to live in it as her home. In case at any time she shall cease to desire it as her home, I direct that as soon thereafter as practicable it be sold at a price not less than dollars (\$.....), or as much more as the property will bring, and the proceeds thereof be invested in good rentable property in, and the rentals of such property be added to the income of the estate.

8. It is my will, and I so direct, that, in addition to the use of said homestead and furniture, my said wife,, shall have one-quarter of the net annual income of the remainder of my estate during her natural life, subject to modifications in article of this instrument. And it is expressly stipulated that the above bequests to my said wife are in lieu of dower.

9. It is my will, and I so direct, that my son,, shall have one-quarter of the net annual income of my estate (homestead not included) until such time as, in accordance with the provisions of this will hereinafter named, he shall come into possession of the entire estate; but the expenditure and use of said income during his

minority shall be under the control and direction of his guardian. And I appoint his mother his guardian during his minority, and, in the event of her death, I appoint my brothers, and in her place.

10. It is my will, and I so direct, that my brother, shall have one-quarter of the net annual income of my estate (homestead not included) during his natural life.

11. It is my will, and I so direct, that my brothers and shall each have of the net annual income of my estate (homestead not included) during his natural life.

12. It is my will, and I so direct, that when my son,, reaches his majority, he shall become the owner in fee of dollars (\$.....) worth of my real estate; and at (.....) years of age he shall have an additional dollars (\$.....) worth of my real estate; and at (.....) years of age he shall have an additional dollars (\$.....) worth; and at (.....) years of age he shall have an additional worth; and at (.....) years of age the remainder of my estate shall become his. And I also direct that the income of my said wife,, shall be kept up to dollars (\$.....); any deficit to be taken from the income of my son,; and, as an offset thereto, my son,, shall be entitled to any excess in said wife's income over dollars (\$.....) a year.

13. I also direct that, in the event my son,,

shall de cease after reaching his majority, leaving one or more legitimate children of his body, that the income of (\$.....) worth of estate, or so much thereof as may in prudence be necessary, shall be used for the proper support of such child or children until they shall severally become of legal age, when an equal part of the above-named principal and accrued interest shall become his or hers absolutely.

14. In the event that my son,, shall survive all my other legatees, and then die before coming into possession of my whole estate, it is my will, and I so direct, that the remainder of my estate, as of that date, shall belong to the College, located at,, to be used in the endowment of some new professorship, and the remainder to be used at the discretion of the trustees of said college, in the erection of some building for college uses, or the endowment of additional professorships; such buildings or professorships to bear my name.

15. If either my wife,, or one of my brothers, shall become my only surviving legatee, it is my will, in that event, and I so direct, that my estate at that time be divided as nearly as may be into (.....) equal parts, as regards the value and renting power, and said wife or brothers shall then choose between the income of said properties, and have and enjoy the same during his or her natural life. And it is my will that the other part of my estate shall at that date become the property of College to be used as directed in article fourteen in this instrument. And I further direct that, at the death of said wife or brother, the

remaining part of my estate shall become the property of
 College, to be used as in article fourteen.

I hereby appoint my two brothers, and
, as executors of this my last will and testa-
 ment.

No. 91. The Smith Will.

Pittman v. Burr, 79 Mich. 539. (Lapse of deed.) If a woman, in contemplation of marriage, deeds her property to her intended husband, and he thereupon executes a will devising it to her, and they subsequently marry, the result is to vest the property in him and his heirs forever if she dies first, and to revert the title in her, and her heirs if he dies first.

First, I give, bequeath, and devise to of
 aforesaid, my farm situate in said town of
, which I purchased of said,
 consisting of acres (not including, how-
 ever, what I have since added to said farm), together with
 all the hereditaments thereunto belonging, which devise is
 to be in full of all claims and demands which said
 may have against me at the time of my decease, whether in
 consideration of the purchase of said farm, for services,
 or otherwise.

No. 92. The Aveling Will.

Aveling v. Masonic Aid Ass., 72 Mich. 7. In this case it is held that while, technically speaking, the decedent may not have died seized of the insurance held by him in the association, his intention was to pass it by his will.

I,, of the township of,
 county of, State of Michigan, being in good
 health and sound mind and memory, do make this my last
 will and testament:

I will, devise, and bequeath all those certain lots, known
 as lots,, and
, of subdiv. of the east half

of private claim in the township of
, joining the city of, north
 of the road, so called; also the undivided
 one-half of lot, same subdivision, with all
 the appurtenances thereon. I also devise and bequeath all
 other property of which I shall die seized, real, personal,
 and mixed, especially all money in Bank
 and Bank,,, all
 bonds and notes and stocks, to of the city
 of, county of, State of
, to him, his heirs and assigns forever.

Witness my hand and seal at aforesaid.
 (Seal).

Signed, sealed, and declared to be the last will and testa-
 ment of the testator, in our presence and in the presence
 of each other, who at his request have signed our names
 as witnesses, this

.....

No. 93. The Sibley Will.

Rock River Paper Co. v. Fisk, 47 Mich. 216. Construction
 of dying without issue.

Know all men by these presents that I, of
 the city of, county of and
 State of Michigan, being of sound mind and memory, do
 make, publish and declare the following to be my last will
 and testament:

Firstly. I will that all my just debts and funeral ex-
 penses be paid.

Secondly. I give and bequeath to my beloved wife,
, all my household goods and furniture, all

my stock, farming tools, wagons, etc., and the use during her life-time of all the lands, buildings and tenements I own at my decease on section number (....) within the said city of; and also dollars at once, or dollars annually, at her election, during her life-time, to be paid her out of my estate.

Thirdly. I will, if it is not done during my life-time, that lot No., Group, I own in the said city of cemetery, be enclosed with a suitable iron fence, and a suitable family monument erected therein, under the direction of my beloved wife, should she be living, and if not, under the direction of my beloved son

Fourthly. I give and bequeath to my beloved son, when he arrives at the age of years, dollars, and dollars annually thereafter until he arrives at the age of years; and if at that time he shall have used what he has received, as above stated, in a judicious, frugal manner, and **not** wasted and squandered it, (in the opinion of my executors hereunto appointed), he shall then receive dollars more; and if, at the age of years or sooner, if in the opinion of my said executors he shall have managed, and will continue to do so, what he has already received, in a judicious, frugal manner, he shall receive dollars more; and if, at the age of years, or sooner, if in the opinion of said executors he shall have and will still continue to use what he has received, as before stated, in a frugal, economical and judicious manner, he shall come

into full possession of all my estate, personal and real, not otherwise disposed of by this will or otherwise. But if, after having received dollars at the age of years, he shall have squandered and wasted what he has already received, or in the opinion of said executors he will waste and squander what he receives, he shall thereafter receive but dollars annually, and all my estate, real and personal, not otherwise disposed of, shall go to the legal issue or children of my beloved son,; but in case he dies without said issue or children, then in that case it shall go to my legal heirs and representatives equally, according to law, except my beloved sister, and her heirs, who shall receive only dollars.

Lastly. I give and bequeath to my beloved nephew,, all the land I own in, county, Michigan, being the west fractional one-half of section number (....), in said town of, he, the said, to pay to my estate for all stock and tools, and all other personal property that I have put on to said land, as per my books, at the end of years, with interest thereon annually, and I hereby appoint,,, and as executors, to carry out the foregoing will, and they are to have the control and direction of my beloved son,, during his minority, and the above-named executors, a majority of them, are authorized to choose their own successors in office.

..... (L. S.)

Signed and sealed in presence of

.....,

.....,

No. 94. The High Will in the Form of a Letter.

Rue High, 2 Drugl. 515.

Dear Brother, it has become my painful duty to call upon to inform my distant relations of my dying request; and it is owing to the kind and brotherly treatment I have received from, that I am not now in my grave; and I request him to notify you of my last wishes. I wish you, my brother, to make use of the money I left with you as your own. I give and grant it to you. And my watch I leave to, your wife. Dear Brother, I began the voyage in the hopes of obtaining my health, and after all the kind and friendly attention I could receive on the passage, I arrived safe at Then I went on shore, but finding the climate wet, and the prospect all against me, I concluded to remain with, and go farther south. And now, at this place, although all has been done for me possible, I am fast falling away; and I still remain with, for I should soon die on shore, and have all the attention I can ask or wish. I had a Doctor at, and he told me he could do nothing for me; and I have had a Doctor here, and he ordered me to remain on board the ship, saying that I would get no attention on shore, and the expenses are very high. Dear brother, has done all for me that any man could do, and I am happy to know that you will feel satisfied that I found a friend in my last and trying moments. has given me friendly and christian counsel, and I hope I

have profited by it, and am prepared to meet my Saviour in the world above, where all is peace and rest. I know that I have been a great sinner, and I look to Christ for pardon and acceptance. I have long been thoughtless, but now I feel there is no hope but in Christ. O, take warning from me, and turn to God, who will abundantly pardon. O give my dying words to all that are dear, and tell them to turn to Christ. And, my dear Brother, put not off the evil day until it be too late. O comfort my dear and aged Father, and see that he does not want for any thing during life. Tell him I thought of him until the last. And now, dear Brother, I have given all things into the charge of —my papers and all my effects—to do and act as he thinks best. My note of \$., due to me in, I have lent to for years from the date of the note, if he will collect it, for his great kindness to me during the time I have been with him, and in all my illness, and wish you to take his note for the same. And now, dear Brother, I bid you farewell.

(Signed)

Witness to signing,

.....

No. 95. A Will Not Naming Beneficiary.

This will was sustained in the Circuit Court for Macomb County on the authority of the case, *In re Harrison, Turner v. Hillard*, 30 Law Reports 390. This will and authority was kindly furnished us by Mr. William H. Wetherbee, of the Detroit Bar.

I, of in the county of and State of, being of sound mind and memory, do make, publish and declare this to be my Last Will and Testament, in manner following, viz:

First, I will and direct that all my just debts and funeral expenses be paid in full.

Second, I give, devise and bequeath all my real and personal property, of which I am possessed, viz:

.....

 and, I hereby appoint my husband
 of county, my executor of this
 my Last Will and Testament without bond.

Lastly I hereby revoke all former wills by me at any time made.

In witness whereof, I have hereunto set my hand and seal this day of in the year
 of our Lord

Signed (Seal)

On this day of A. D.
, of, in the county
 of and state of signed the
 foregoing instrument in our presence, and declared it to be
 her Last Will and Testament, and as witnesses thereof we
 do now, at her request in her presence and in the presence
 of each other subscribe our names.

....., residing at

....., residing at

No. 96. The Palms Will.

Palms v. Palms, 68 Mich. 356. Devise of the income to children for life, although embraced in a single paragraph, is, by the well-settled construction of similar clauses, a devise to each in severalty of a life-estate in one-half of the property.

I hereby give, devise, and bequeath all my property to
, and as

trustees and in trust for the uses and purposes following, to wit:

1. To collect all rents and other moneys owing to my estate; to sell, lease, repair, and improve any of my property; to invest and re-invest the proceeds thereof in lands in the city of, and interest and dividend paying securities; and to do all acts and to pay all necessary expenses for the care, protection, and management of my estate that I might do if alive.

2. to pay dollars to my brother,
.

3. To pay dollars to the
of

4. To pay dollars to the
of

5. To pay, semi-annually, one-half of the net income of my estate to my son,, during his life, and the other half to my daughter, during her life.

6. Upon the death of my son, to pay one-half of the principal of my estate to his children, in equal portions. If no issue survive him, then the same to be paid to the children of my daughter upon her death.

7. Upon the death of my daughter, to pay one-half of the principal of my estate to her children, in equal portions. If no issue survive her, then the same to be paid to the children of my son upon his death.

8. Upon the death of either of my children leaving no issue, the entire net income of my estate shall be paid to my surviving child during his or her life.

9. If any of my grandchildren die before their father (he being my son), or before their mother (she being my

daughter) leaving issue, such issue shall be entitled to the share of such grandchild.

10. The share of any grandchild who may be a minor upon the death of his father (he being my son), or of his mother (she being my daughter), shall remain a part of said trust-estate, and under the management of said trustees, until such child shall be of age. In that case said trustees shall make such allowance as to them may seem proper for the support and education of such grandchild.

11. I hereby appoint as trustee of my estate, to fill the vacancy which may be made by the death, resignation, or incapacity of either of my said trustees, giving him the same interest and estate, and the same power and authority, as is hereby given to the trustees first herein named.

12. If either of my children contest this, my will, and seek to have the same declared invalid, such child shall receive no portion of my estate, and in such case I direct that the whole net income thereof be paid to my other child during his or her life.

13. I hereby appoint, and the executors of this my will.

In witness whereof, I, the said have hereunto set my hand this day of,

.....

Signed and declared by the said as and for his last will and testament in the presence of us (both being present at the same time), who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

.....,,

.....,,

CODICIL.

I,, of, Michigan, having made my last will and testament, bearing date the day of,, do now make this codicil to be taken as a part of the same:

First. I do hereby ratify and confirm said will in every respect, save as far as any part of it is inconsistent with this codicil.

Second. I hereby direct that the royalties and other moneys received from leases of mineral lands, whether such leases be made by me during my life, or by my executors and trustees after my death, shall be considered as a portion of the capital of my estate, and shall be invested as such by my executors and trustees. The income derived from such capital to be paid to my children as in my will provided. The accumulation from this source not to continue longer than the minority of my grandchildren now living, after which the royalties and income from mineral lands shall be paid to my children.

Third. I hereby remove the restriction in my will directing the executors and trustees to invest and re-invest the proceeds of my estate and lands in the city of, and interest and dividend paying securities, and hereby authorize my said executors and trustees to make such investments as in their judgment may be for the best interests of my estate.

Fourth. If either of my children contests this codicil to my will, and seeks to have the same declared invalid, such child shall receive no portion of my estate, and in such a

case I direct that the whole net income thereof be paid to my other child during his or her life.

Fifth. It is my wish that my executors and trustees be not required to give bonds.

In witness whereof, I,, have, to this codicil to my last will and testament, subscribed my name this day of,, at said

.....
Signed and declared by the said as and for a codicil to his last will and testament, in the presence of us (both being present at the same time), who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

.....,, Michigan.

.....,, Michigan.

DEFECTIVE WILLS.

- No. 97. The Dean Will.
- No. 98. The Niles Will.
- No. 99. The Holmes Will.
- No. 100. The Snow Will.
- No. 101. The Petit Will.

Dean v. Mumford, 102 Mich. 512. Provisions in a will which are not valid when made and when the will takes effect cannot thereafter be made valid by the election of the widow to take under the statute. Provision against statute of perpetuities.

No. 97. The Dean Will.

First. I give and bequeath to my beloved wife,, the use of the homestead now occupied by us, No. street, together with all the furniture and other personal property thereon and connected therewith, to be used and enjoyed by her during her natural life as a home for herself, and for such of my children as shall remain unmarried, and shall be agreeable to her; the taxes and repairs upon said homestead to be paid by my executors from my estate.

Second. I also give and bequeath to my said wife the sum of \$. per annum, to be paid to her quarterly or monthly by my executors, as she may desire; to be received, used, and enjoyed by her during her natural life.

Third. All the rest, residue, and remainder of all the goods, chattels, real and personal estate, of whatsoever kind or nature, or wheresoever the same may be situated, I desire to be divided equally between my children,—, aged;, aged;, aged;, aged;

and, aged or to the survivors of them, excepting in case any of them shall die leaving child or children surviving; then, in such case, the respective interests of my sons and daughter above named shall go to and belong to the child or children surviving them, respectively.

Fourth. Whereas, I have advanced to my sons and certain sums of money, which will appear charged to them upon my books, and if I shall advance to them, or either of them, or others of my children, during my lifetime, other sums, all such sums in money or property which I shall advance to or pay for and shall charge to them, respectively, shall be deducted from the respective portions above designated to go to my said children.

Fifth. I hereby will and direct that the portions hereinbefore designated for my said sons,, and be held in trust by my executors, as trustees for my said sons, their wives and children, and the interest, income, and profit thereof be used and paid as in the judgment of my said executors shall be best for the support and maintenance of my said three sons, their wives and children, during the lives of my said sons and their wives; and, upon the decease of said sons and their wives, the portion so held in trust by my said executors shall become the property of and go to the child or children of said sons, severally, and their heirs and assigns forever.

No. 98. The Niles Will.

Niles v. Nason, 126 Mich. 482. The will in this case is a copy of the Palms will with a bequest added, as shown in paragraph four. This bequest was a charge against the whole

estate and therefore rendered void the other two subsequent bequests for the reason that it tied up the whole estate beyond two lives in being.

I hereby grant, devise, and bequeath all my estate, real and personal and mixed, to, of said city of, as trustee, and in trust for the uses and purposes herein below set forth, to wit:

1. To collect all rents, profits, insurance, and other moneys due the estate upon all real and personal property; to buy, sell, lease, repair, and assign any and all of my estate, both real and personal; to invest and re-invest the proceeds thereof in any manner he may deem fit; and to do all acts and pay all necessary expenses for the care, protection, and management of my estate in my stead.

2. To pay all my just debts and funeral expenses.

3. To pay the sum of dollars to, if he makes himself known in person to said within years from the date of my demise.

4. To pay the sum of dollars to upon the first day of each and every month during her life, contingent upon her remaining unmarried. Upon the event of her marriage the said legacy to cease, and to become part of the income hereinafter provided for.

5. To pay annually one-half of the income from my entire estate, real, personal, and mixed, after the payments above set forth, to my son during his life, and the other half of said income to my daughter,, during her lifetime.

6. Upon the death of my son to pay one-half of the principal of my estate to his children in equal proportions. If no issue survive him, then the same to be

paid to the children of my daughter,, in equal proportions, upon her death.

7. Upon the death of my daughter,, to pay one-half of the principal of my estate to her children in equal proportions. If no issue survive her, then the same to be paid to the children of my son in equal proportions, upon his death.

8. Upon the death of either of my children or, leaving no issue, the entire net income of my estate shall be paid to the survivor of the two during his or her life.

9. In the event of the death of both of my children and without issue, my entire estate, both personal and real, shall be vested in my brother,, and his heirs forever.

10. The share of any grandchild who may be a minor upon the death of his father, he being my son, or of his mother, she being my daughter,, shall be under the care and direction of said trustee, or his successor, as the agent of said grandchild, during his or her minority.

11. In the event of the death of said, trustee, before full execution of this trust, I hereby direct that the trust pass to such person as the court of chancery may direct, as in such case under the statute made and provided.

12. I hereby appoint the executor of this, my last will and testament, and desire that his bond therefor, as well as such bond as he may be required to furnish as trustee hereof, may be merely nominal.

No. 99. The Holmes Will.

State v. Holmes, 115 Mich. 456. The conditional devise has the effect of suspending the power of alienation of the estate for a period not based on lives in being at the time of its creation.

After the death of my said wife, I give and bequeath and devise my said estate, real and personal, to the State of Michigan, upon the conditions following. If the State shall, within the period of years from and after the death of my said wife, formally accept of this provision of my will, and, by due enactment, locate upon my real estate in the said township of some public educational or charitable institution, and build thereon suitable buildings for such institution. If the State shall not accept the foregoing provision, I then direct the said residue and remainder of my estate shall descend to my said grandson,, to him, his heirs and assigns, forever.

No. 100. The Snow Will.

Carpenter v. Snow, 117 Mich. 489. This will was executed during the child-bearing period of life, but with no mention of a child then living and no provision, concerning those to come. The intention of the testator was to disinherit his children, but this cannot be inferred from the will. See C. L. '97, secs. 9285 and 9286.

Know all men by these presence that I of,, County, Michigan, being of sound and disposing mind and memory, do make, declare, and publish this to be my last will and testament as follows:

First—

I hereby appoint executor of this will.

Second—

After the payment of my debts and the expenses of ad-

ministering my estate, I give, devise, and bequeath all my property, real and personal, and all the property of every kind and nature whatsoever, of which I may die possessed, to my beloved wife,

In witness whereof I have hereunto set my hand and seal this day of, 19...

.....

(The attestation clause was properly made out and signed.)

No. 101. The Petit Will.

Petit v. Flint, etc., R. Co., 114 Mich. 371. In this case a power of sale is inoperative on account of the contravention of the statute of perpetuities.

I hereby direct that my executors convey to purchasers, by proper deeds of conveyance, what is herein directed to be sold and converted into money, and to my said children the several shares herein provided for them, and to the children of my said children whatsoever is herein provided to be given to them.

Ninth. I hereby constitute,, and executors of this my last will and testament. And to them, for the purpose of facilitating the sale, division, and distribution of my estate as herein provided, I hereby grant, convey, transfer, and set over, in trust for the uses and purposes herein expressed, all my property and estate, real and personal, of which I may be possessed, to be had and held by them in trust as aforesaid, and to their successors in said trust and their assigns forever. And they and the survivors of them in said trust, or their successors, are hereby authorized and empowered to sell and deed and convey, according to the true intent and meaning

hereof, all and any of the property of my estate left hereby in their hands.

My real estate (not including my homestead of acres), consisting of houses and lots and stores, I direct shall be kept until my son shall become years of age; and when the said shall attain the age of years, then I direct that the said houses and lots and stores shall be sold, and the proceeds divided, etc.

This sale and conveyance being made for the purpose of making a fund from the interest of which the taxes on said land may be paid, according to the provisions of the will of testator.

I direct that, whenever the public good and the best interest of my estate require the same, that this portion of my estate shall be laid out and platted into lots, blocks, and streets, and that so many of the lots shall be sold as may be necessary to make a fund, the interest of which will be sufficient to pay the taxes and expenses of platting and taking care of the same, and that the remainder thereof shall be kept by my executors for years after my decease, when the same shall be divided and distributed as follows, viz., etc.

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